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FOREWORD

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THE DETROIT BAR.

CHARLES I. WALKER.

At a meeting of the Detroit Bar Association, held on the 13th day of May, 1892, a resolution was passed inviting me to prepare a history of the Detroit Bar.

For more than forty years I have been a member of the Detroit Bar, and during that time have known most of the members thereof, and many of them very intimately. Also at an early date I became deeply interested in the early history of the Northwest, and I have spent much time in its investigation and in the collection of books and papers relative thereto. I have been familiar with many bar associations in this and other states; and this has led me to form a very high opinion of the Detroit Bar, both as to its character and capacity. It will compare very favorably with any other bar both as to learning and capacity, integrity and high moral character. No class of our citizens during the war of the rebellion exhibited a better and more enthusiastic devotion to the Union than the members of the bar, both in public meetings and by personal efforts and services. While this controversy was at its height, the Bar of Detroit, led by such men as A. W. Buel, James F. Joy, Jacob M. Howard and G. V. N. Lothrop, invited a meeting of the citizens generally for the purpose of expressing their devotion to the Union. Such a meeting was held, and the members of the bar were among its most active supporters.

As bearing upon this question, and the reputation and character of the Bar of Detroit, I refer to Vol. 3, of the Magazine of Western History, published at Cleveland, Ohio, in 1885. The article was evidently written by some one who had made it a careful study. The writer says: "It may be said without danger of contradiction, that the territory of Michigan, and the city of Detroit, in particular, have been remarkably fortunate in the men who have composed their bar.

Of course the character of the bar and its true position have been moulded largely by the civil and political history; and this is particularly true of the Bar of Detroit. The same writer in the Magazine of Western

History says; "The administration of justice in Detroit has been marked by a greater variety than that of any other city in the United States." And he specially refers to the fact that it acted at different times under the authority of France, Great Britain and the United States.

I refer to some historical events that have a bearing upon this question. Detroit and its surrounding territory formed a part of the Great Northwestern Territory. An earnest struggle had arisen between France and Great Britain as to which power should have control of the new world, and thus settle its future character and history. France came into possession of Canada at an early day, and for the most part of the Great Northwest, especially all that territory lying north of the Great Lakes. Great Britain brought under its control the portion of territory that now forms the United States, and there was an earnest rivalry between these two great nations. Immigrants came from across the ocean and formed settlements in the various localities, and this commenced at an early date. Father Claude Allouez founded the first white settlement of Lake Superior as early as 1665, and succeeded in getting the kindly and hospitable Indians to favor them. About that time other settlements were made at Sault Ste. Marie, Marquette, Mackinac and other places. These immigrants were for the most part French and Catholic and were largely under the influence of the Jesuit Fathers. Of course the territory now forming the United States was principally settled by the English.

Detroit was founded in 1701 by D'Lamotte Cadillac, who acted under French authority, and from the first the French influence prevailed. The rivalry of the two nations lasted many years, and the victory of Wolf on the Plains of Abraham in 1759, settled the controversy in favor of Great Britain; and the French conceded their right to the territory claimed by them to the English. England thus came into control of the Canadas and the territory around Detroit about the year 1760. Soon after this, the revolutionary war commenced, and which lasted until 1783, when Great Britain, by the treaty of Paris, conceded the independence of the territory now known as the United States. This treaty was one of the remarkable events in our history and was signed by three great historical names, John Adams, Benjamin Franklin and John Jay. But notwithstanding this treaty Great Britain continued in possession of Detroit and the surrounding territory until after Jay's treaty of 1794, when they agreed to withdraw their troops from American territory, and did so in 1796.

Up to this time, while the number of inhabitants had increased very considerably, there was no well established judicial system. Until 1760, the English common law was not recognized, nor was the French law very fully developed or applied. From 1760 up to the time of Jay's treaty, Great Britain was in control of Detroit and its surroundings; but during a large portion of the time war prevailed and there could not be said to be a judicial system. The military had control. The first action that congress

took in organizing the territory was in passing the ordinance on the 13th of July, 1787, "For the government of the territory of the United States northwest of the river Ohio," and this was a very remarkable form of government. It was evidently prepared with great care and is quite original in its peculiarities. It was provided among other things, that a governor should be appointed by congress whose term should be for three years; and there was to be appointed a court to consist of three judges, any two of whom could act and have a common law jurisdiction; and their office was to continue during good behavior. Legislative power was really bestowed upon the governor and judges by the following language: "The governor and judges, or a majority of them, shall adopt and publish in the district such laws of original states, criminal and civil, as may be necessary and best suited to the circumstances of the district. The ordinance further provided protection for personal liberty, rights of trial by jury, etc. This act of course included a large territory connected with Michigan. There was then no separate organization of the territory subsequently known as Michigan.

Courts were organized under this ordinance as early as 1789, but the business was very small and gave very little opportunity for professional labor or skill. Courts were held sometimes at private houses, sometimes at taverns, and it was said that they sometimes sat upon wood-piles. The limited extent of the business may be somewhat inferred from the fact that an appropriation of \$85 was made to establish and organize a court at Detroit in 1796. This state of things continued until the territory of Michigan was formally organized on the 11th of January, 1805, by an act of congress. The provisions of the ordinance of 1787, were in the main re-enacted in the law organizing the territory.

As we have already seen by the ordinance referred to, the governor and judges were possessed of legislative power; and by a law passed by the legislature, authorized courts were established and three judges were appointed. Governor Hull was the governor, and Judges Woodward, Bates and Huntington were appointed to the bench; although Huntington failed to qualify, and his position was given to Judge Griffin.

The governor and judges immediately commenced their work as law makers. Within two months from the organization of the territory, a large number of statutes were enacted; many of them of a very important character, and were drawn with great care and professional skill. To give an idea of the work done and its importance, I give a list of a few of the acts in the order in which they were enacted. The first was enacted on the 9th of July, and the last on the 31st of August.

1. An Act fixing a seal for the territory.
2. An Act concerning the duties of the marshal of the territory.
3. An Act relating to the oath of justices of the peace.
4. An Act concerning oaths and affirmations.

5. An Act authorizing foreigners to hold and convey lands.
6. An Act concerning the supreme court of the territory.
7. An Act concerning district courts.
8. An Act concerning the recovery of debts to the amount of twenty dollars.
9. An Act concerning notaries public.
10. An Act concerning marriages.
11. An Act concerning grand and trial juries.
12. An Act concerning appeals.
13. An Act concerning recording of deeds.
14. An Act concerning ferries, tavern-keepers and retailers of merchandise.
15. An Act concerning auctions.
16. An Act concerning the militia.
17. An Act concerning compensations.
18. An Act concerning wills and intestacies.

Many of these acts are very long and are drawn with very great care; and it required no small degree of the ability of lawyers to prepare or to construe such legislation.

No doubt the influential man in this legislation was Judge Woodward; and a book known as the Woodward Code was published. Judge Woodward was a man of very great ability although with many peculiarities and erratic notions. He was on the bench for eighteen years, and as has well been said, "He was a gentleman, both in ability and education." His name has been perpetuated by the great avenue which bears his name. Courts were organized under these laws. Thus after thirty years of territorial life Michigan became a state. Many of the territorial judges were men of high character and great ability; and a notice of them and of other members of the Bar is found in the 4th of Michigan Reports, written by Judge Witherell, who was a son of one of the judges, and a man whose name is cherished by many of our older citizens.

Many of the lawyers of this territorial period were men of marked ability, and some of them have left names that will not be forgotten. Previous to the territorial organization there does not seem to have been any regular bar organization; but on the 25th of July, 1806, Solomon Sibley and Elisha Brush were admitted to practice as attorneys in the supreme court. These were both men of marked ability and belonged to some of the noblest families, and have left a strong influence upon subsequent history.

Of course on the organization of Michigan as a state, it had the power to establish and regulate its own courts, and a very liberal provision was made to establish a court of chancery. From the time of its admission to the Union as a state in 1837, more than half a century since, Michigan has been an independent state, selecting and controlling its own judiciary,

and that judiciary has gained a reputation of which as citizens of Michigan, and especially as members of the Bar, we may be proud. As a rule judges have been wisely chosen, and some of them were men of marked ability and high reputation both as to learning, ability and character.

This is not an occasion to give a biographical notice of the men who have been elevated to these high positions. Many of them have obtained a national reputation. It may be well to call attention to some of the judges of the supreme court at particular times as shown by our reports. Thus, in the 15th of Michigan we have the names of the judges of this court in 1866, and they are as follows: George Martin, chief justice, Isaac P. Christiancy, James V. Campbell and Thomas M. Cooley, associate judges. In the 53rd of Michigan we have the names of the judges for 1884, which are as follows: Chief justice, Thomas M. Cooley, associates James V. Campbell, Thomas R. Sherwood and John W. Champlin. These furnish a fair illustration of the eminence of the men thus elevated to the bench.

The Bar of Detroit has had a very marked influence upon the legislation of the state; and while much of that legislation is still very imperfect, it has been modified and improved by the action of members of the Detroit Bar. From the very nature of their profession they would look carefully after proposed amendments to existing laws and would take an active part therein. This could be shown in scores of cases but I will refer to only one case, which is a fairly illustrative one.

As is well known, by the English common law, and the English law made practical in this country, persons charged with high crimes were brought before courts for trial only upon indictments found by a grand jury in the first instance. Grand juries filled a very important place in the criminal law in England and in this country, and they were created under special statutes; thus in this state at an early day there was much legislation in reference to grand juries, directing their mode of appointment and defining the power of courts in matters pertaining to them. See laws of 1883, pp. 184, 219; Revised Statutes of 1838, p. 603 to 607.

In 1857 the charter of Detroit was revised under the guidance of some of the best lawyers of the time, including such men as James F. Joy, G. V. N. Lothrop and Judge Morrow, then recorder of the city. Session Laws of 1857, No. 33, pp. 110, 111. This act introduced an important reform in criminal proceedings, and practically did away with grand juries in Detroit. This act undoubtedly led to a subsequent act of the legislature, affecting the whole state, which gave to the several courts of record jurisdiction to prosecute in criminal cases by information as well as by indictment. Laws of 1859, No. 138, p. 391. The passage of this act is largely due to the earnest efforts of Alexander W. Buel, a distinguished member of the Bar of Detroit, who was then a member of the house of representatives and introduced the bill for the purpose of accomplishing

this important change in criminal procedure. The experience of more than three decades under this act has fully shown the wisdom and sagacity of his advocacy of the measure.

Many of the men who have been among the most active and influential members of the Bar of Detroit—some during the latter years when Michigan was a territory, but most of them after it became a state—have passed away; but here they finished their life's work, and as I was personally acquainted with nearly every one of them, it seems to me appropriate that in this sketch most of them should in a few words receive special mention.

HENRY S. COLE, at the closing period of the territorial Bar, was probably its most prominent member. He was a good lawyer, an eloquent advocate and an upright, honorable man. He was of the firm of Cole & Porter, and was familiarly styled among his fellows, Harry Cole. None of the active members of the present Bar knew him; but his ability as a lawyer is well known to living lawyers who came to the Bar about the time of his death, which occurred in the spring of 1836. My knowledge of his worth and character was derived from Hon. James F. Joy, who was acquainted with him.

AUGUSTUS S. PORTER was partner in the legal firm above mentioned; was a man of integrity, though not an advocate. In 1840 he was elected senator in congress from Michigan, and served in that capacity until 1845.

WILLIAM WOODBRIDGE was also one of the able members of the territorial Bar in active practice; was elected governor of the state in 1840, and while holding that office was in February, 1841, chosen by the state legislature as senator in congress.

He was somewhat eccentric in character, was a good advocate at the Bar and had considerable learning.

DANIEL GOODWIN, afterwards a circuit judge, was a good lawyer of those days, distinguished for his integrity and for the care and ability with which he prepared and argued his cases. In his judicial career he was noted as an honest and clear headed judge.

GEORGE F. PORTER was admitted to the bar in Vermont, but on coming to Detroit before Michigan became a state, he was for a time employed in a bank. He became a member of the legal firm of Joy & Porter about the year 1837, and continued active in the profession chiefly as the office lawyer of the firm until its dissolution in 1852. He was an able and efficient lawyer in the preparation of cases, but was not an advocate.

After the passage of the act of the legislature authorizing the organization of the Michigan Central Railroad Company, and the sale to such company when formed, of the Michigan Central Railroad, then partially constructed, Mr. Porter was instrumental in persuading eastern capitalists

to invest in the stock of this company, at the time when many of them were hesitating under the impression that the terms were unfavorable to such an investment. Mr. Porter's effective efforts in overcoming such objections, and in bringing about the sale of the railroad are not generally known, but they were regarded as of essential service to the state.

ALEXANDER D. FRAZER, born and educated in Scotland, where he was thoroughly taught in his profession, came to Detroit when Michigan was yet a territory, bringing with him a larger law library than any fellow member could then boast. For fully forty years he was an able and successful member of the Bar of Detroit, and was especially skilled in the law of equity. He was recorder of Detroit in the year 1840. He passed away less than a score of years ago after a long and lingering illness.

JACOB M. HOWARD was a leader at the bar; was not only learned in the law so as to be able to present legal questions clearly and logically to the court, but was also especially distinguished for the masterly manner in which he argued matters of fact, as shown by the evidence, to a jury.

He served as the second member in the congress of the United States when the whole state of Michigan was one district, that is from 1841 to 1843; was attorney-general of Michigan from 1858 to 1861, and in that office gave very important service to the state; was in 1862 chosen United States senator to fill a vacancy, which position he held until 1871. While in the senate of the United States he rendered a special service to the whole nation by his able and learned speech, in reference to the right of the United States to the island of San Juan, on our northwestern border; a right disputed by Great Britain, which nation also strenuously claimed it. The clear and able argument of Mr. Howard, it is believed by many thoughtful men, was so convincing to the arbitrator, the King of Prussia, to whom the dispute as to boundary line had been submitted, that his decision was in favor of the United States. Leaving the senate in 1871, Mr. Howard returned to the practice of his profession in which he continued until his death a few years thereafter.

THEODORE ROMEYN was a leading member of the bar very soon after Michigan became a state; then went to the city of New York, where he remained for several years, but returned to Detroit about the year 1859, and spent the remainder of his life here in active practice. His counsel was sought in many different cases, for his skill as a lawyer was well known to his fellow members of the profession.

ALEXANDER W. BUEL, an honorable, laborious and successful lawyer for many years in this city, was noted for his strict integrity, and was chosen as representative to our state legislature for the years 1838, 1848 and 1859. In the year 1848 he was the speaker of the house, and in 1859 he introduced and advocated the passage of Act 138 of the session laws of that year changing the mode of criminal procedure throughout the state from an indictment by a grand jury to the much simpler and less

expensive mode of an information to be drawn and filed by the prosecuting attorney. He was representative in congress from 1848 to 1851.

JOHN A. VAN DYKE and HALMOR H. EMMONS, formed, for more than ten years the law office of Van Dyke & Emmons. Both were able men and the firm did a large legal business until the death of the former in 1855. After his death Mr. Emmons continued in active and successful practice for several years, and was then appointed district judge for the eastern district of Michigan. He was a brilliant advocate and an able judge.

WILLIAM GRAY was an eloquent and successful advocate and universally esteemed by his fellow members of the bar, on account of his genial temperament and his keen wit, which though sharp was never biting. He was a great favorite at bar dinners and social gatherings where his brilliant qualities had full play, and where he gave great delight to his compeers. He was city attorney in 1850.

HENRY N. WALKER was prominent at the bar in the early history of the state, and was for a time a partner in the firm of Douglas & Walker. He was appointed reporter of the court of chancery about the year 1844. He edited and published the volume of Harrington's Chancery Reports after the death of E. Burke Harrington, and also compiled and published in 1845, the volume of chancery reports which bears his name. He was a member of the state legislature in 1844, was attorney-general of the state in 1845 and 1846. He retired from the practice of his profession some years before his death, to engage in railroad matters.

HENRY T. BACKUS was a member of the Bar of Detroit before Michigan became a state; was elected to the legislature of Michigan in 1840, and to the state senate for 1861 and 1862, of which body he was president *pro tem* for the former year. For about fifteen years he was the head of the law firm of Backus & Harbaugh, which did a large business in the circuit court and the supreme court. He always gave careful attention to the preparation of his cases and continued in practice until nearly the close of his life.

DAVID E. HARBAUGH was, as above mentioned, Mr. Backus' law partner for many years; was also frequently called upon to hold official positions in which a knowledge of law was necessary. He was a member of the legislature in 1840, was city attorney in 1845, city recorder in 1850, and late in his life served one term as police justice for the city. He also held the office of collector of internal revenue for four years, having been appointed to that office in 1865. He was considered a good lawyer and an upright man.

SAMUEL BARSTOW was an able and successful member of the Detroit bar at an early day, and about the year 1845 associated with him in business Thomas W. Lockwood, and the firm of Barstow & Lockwood continued in active practice until the death of the senior partner in the

year 1854. He was a member of the state board of education in 1849 and 1850. Mr. Barstow was a man of ability, integrity and of public spirit, and was highly respected by his fellow citizens. He took a special interest in the public schools of the city, and after his death one of the large edifices built for school purposes was given his name.

THOMAS W. LOCKWOOD, already named above, continued in the practice of his profession until his death in 1865. In 1855 he associated with him Hovey K. Clarke as his partner, and the firm of Lockwood & Clarke continued in successful practice until the death of Mr. Lockwood in 1865.

From 1861 to 1864 Mr. Lockwood was a member of the legislature of the state. He was an active member of the Bar for more than twenty years, and was universally respected in the community.

HOVEY K. CLARKE came to Detroit from Calhoun county about the year 1854, where he had previously practiced his profession, and in 1855, became a member of the law firm of Lockwood & Clarke, a firm which did a successful business until the death of Mr. Lockwood in 1865. Mr. Clarke continued to practice alone until the passage of "The Bankrupt Act" of 1867 by congress, under which act he was appointed register in bankruptcy, and thereafter he gave his entire time to the duties of that very important position, which he filled to the general satisfaction of the lawyers who had business before him. He was a good lawyer and an upright man.

JAMES V. CAMPBELL was born in Buffalo, New York, February 26th, 1823, and came to Detroit with his parents in 1826, where he grew up to manhood, and continued to reside until his lamented death, which occurred suddenly on March 26th, 1890. His honorable career as a member of the Bar of Detroit for thirteen years; as judge on the bench of our supreme court for more than twenty-two years; as Marshall professor of law at our state university for a quarter of a century; and as an author, as has been so fully set forth in the memorial exercises after his death, held at Lansing, and published in vol. 81 of our supreme court reports; that I refer to its pages for a brief epitome of the work so well and worthily performed by him, who was so well known and loved by us all.

WILLIAM A. HOWARD was known chiefly as a business lawyer without much general practice at the Bar; was city attorney in 1846, and continued in business until 1855, when he was elected as representative in congress for three successive terms, and soon after his return from Washington he removed to Grand Rapids, where he spent the remainder of his life. He was a man of much ability and an effective public speaker; but was not practically distinguished as a lawyer, though widely known throughout the state.

D. BETHUNE DUFFIELD, who passed away early in the year 1891, was not only an excellent business lawyer through a long period at

the Bar of Detroit, in which he was distinguished as an earnest and successful advocate; thoroughly upright and honored in his whole life; but he was also noted for his kind attentions to young men just entering the profession, and was much beloved by them. He was from about 1844 to 1856 a member of the law firm of Lothrop & Duffield, that did a large legal business. Besides his legal practice he found time to cultivate his taste for literature; and has left a volume of published poems. He labored efficiently for the public good as a member for several years in the school board, and one of the school buildings bears his name.

JOHN S. NEWBERRY was a graduate of the University of Michigan in 1847. After his admission to the Bar of Detroit he was for several years a member of the legal firm of Newberry & Poud, but his practice was confined chiefly to the United States courts, where he became especially distinguished in admiralty cases. He compiled at least one volume of admiralty reports, but subsequently retired from the practice of his profession, and gave his attention to business pursuits in which he was very successful. He served one term in Congress, from 1879 to 1881. His death occurred after a lingering illness only a few years age.

LEVI BISHOP entered the legal profession after losing his arm by an accident, having previously been a shoemaker. He was a man of marked characteristics, and became noted at the bar for his great energy and perseverance. He was eloquent and fervid in his delivery as an advocate, and was justly regarded by opponents as a formidable adversary in presenting questions of fact before a jury. As a member for many years of the firm of Bishop & Holbrook, he was a successful advocate, and after the dissolution of that firm, he continued to do some law business almost to the day of his death.

DEWITT C. HOLBROOK, for many years partner of the above, was especially noted as a careful and methodical business and chancery lawyer, and was always fully employed in his profession until his health failed. He served the city for one term as city counselor. He passed away after an illness which continued for several years.

ROBERT P. TOMS was a member of the Detroit Bar, to whom was entrusted the care and management of several large estates, and his large business in which he was very successful, was confined chiefly to his own office. He was noted for his kind and benevolent character, for the many favors he bestowed upon others, and he was universally esteemed by all who knew him. He had accumulated at the time of his death in 1884 as the result of his skill and good management a large estate.

WILLIAM P. WELLS, whose sudden death in 1891 while arguing a motion in the Wayne circuit court, will long be remembered, was an able and well known member of the Bar for more than thirty-five years. He was a native of Vermont, and a graduate of the university of that state in the class of 1852. He was scholarly in his tastes, clear and dis-

tingent as an advocate in the presentation of the facts of a case before a jury, and was a brilliant orator. During the latter part of his life he was for several years a professor in the law department of the University of Michigan at Ann Arbor, where his lectures were always listened to with great interest and profit by the large number of law students who have attended that flourishing institution. The subject matter brought before the students in each lecture delivered by him for their thoughtful consideration was always so forcibly and clearly presented, that it could not fail to be impressed upon the minds of all who were under his instruction. It is quite probable that it was as a teacher of law in this institution that his work in life was most useful and most effective.

The present Bar of Detroit contains several hundred members in active practice, very many of whom are doing a large and successful law business; but should I mention the names of some of them, who seem to be specially distinguished in the profession, I should be very likely to omit others equally worthy of mention, as representative men, therefore I deem it the wiser course to refrain from mentioning by name any living member of the Detroit Bar, who are now active in the profession.

This determination will not prevent me, however, from making individual mention of a few of my compeers still living, who have for more than forty years past been especially distinguished in their professional career for their legal learning, diligence and success; but who have voluntarily left the ranks of the active practitioners to enjoy the ease and comfort which they have fairly earned by a long and active service as members of the Bar of Detroit.

JAMES F. JOY is a native of Durham, New Hampshire, and a graduate of Dartmouth College in that state. He came to Detroit before Michigan became a state, and almost immediately entered upon the practice of the legal profession, for which he was well fitted both from his natural ability and superior culture. He soon became eminent among his fellow members of the Detroit Bar of that early day, several of whom were distinguished for legal ability and high scholarship.

In 1837, when Michigan had only just reached the dignity of statehood, Mr. Joy associated with him in his practice George F. Porter, and for the next fifteen years, or till 1852, when the firm was dissolved, the senior member of Joy & Porter was undoubtedly one of the most successful advocates and counselors at the Detroit Bar, as he was the active member of that firm whose cases he advocated in the courts.

In 1848 the legislature of this state passed an act authorizing the incorporation of the Michigan Central Railroad Company, and the sale by the state to such company, when formed, of the Michigan Central railroad which was then but partially constructed, and immediately after the passage of this act Mr. Joy became interested with others in the formation

of such corporation, with the result that it was formed and purchased said railroad from the state.

Mr. Joy became the counsel for the new corporation, and henceforth his time became gradually absorbed in the legal business affecting the interests of this principal client until 1852, when he gave up his general law business, and since that year has been almost exclusively engaged as counsel for railroads; not all of the time for the Michigan Central Railroad Company, but of late years for other companies.

Though now nearly eighty-two years old he is noted for his physical health and mental vigor, and is still acting as legal counsel in matters connected with railroads, where legal ability of the highest order is demanded. His success in life, both in acquiring property and in receiving merited honors from his fellow men, has been great, but it is only commensurate with his just deserts.

SAMUEL T. DOUGLASS is of the seventh generation from his ancestors of that name, who emigrated from Great Britain in the year 1640 and became one of the early settlers of New England, and is therefore of genuine Yankee blood. He was born in Wallingford, Rutland County, Vermont, on the twenty-eighth day of February, 1814, but in his infancy his parents removed to Fredonia, Chautauqua County, New York, where he grew up, and received such higher education as it could afford him, but he never went to any college.

At the age of sixteen years he taught a district school in the vicinity; subsequently while still a mere youth, he began his legal studies in the office of Hon. James Mullet, for several years judge of the supreme court of that state. In 1832 he went to Saratoga, New York, and there continued studying the books pertaining to his chosen profession in the office of Esek Cowen, the well known author of Cowen's Treatise. He removed to Detroit in the year 1837, where he was soon after his arrival admitted to the Bar of Detroit, of which he has since continued a member, though for several years of the time he was not a practitioner in its courts. Within a few months after his admission he became a member of the law firm of Bates, Walker & Douglass; his partners therein being Asher B. Bates, and Henry N. Walker. Mr. Bates soon retired, and the firm of Walker & Douglass then formed, which continued until 1845, when James V. Campbell, upon his admission to the bar, became a third member of the firm of Walker, Douglass & Campbell, which ended in 1851, when Mr. Douglass left the firm to take his seat upon the bench of the circuit court for the county of Wayne, to which he had been recently elected under the provisions of the constitution of 1850, which made the circuit court judges elective instead of appointive, as they had hitherto been.

Mr. Douglass had already been a reporter of the decisions of the supreme court for three years commencing in 1845, and two volumes of our reports bear his name. The head notes prepared by him in these vol-

umes indicate clearly the questions involved in the decisions made by the court of last resort in our state.

By his election to the bench of the circuit court he became *ex officio* a member of the supreme court of the state, which was then composed of the several circuit judges, sitting together at stated terms, to consider and decide those decisions made by each circuit judge, which were claimed to be erroneous by losing parties and their counsel.

He remained upon the bench until 1857, when an act of the legislature was passed providing for the formation of a separate supreme court, the judges of which were to be elected in April of that year, and to take their seats on the 1st of January, 1858. Judge Douglass not desiring to remain confined entirely to the bench of the circuit court, thereupon resigned his seat and returned to the active practice of his profession in Detroit, and continued constantly and laboriously therein until he voluntarily abandoned it a few years ago and retired to his farm, entirely satisfied with the competence which he had acquired as the natural result of a long career at the bar, and an honorable, well spent life.

He was often selected as counsel with younger men in the profession in important cases, and was always welcome to them as a coadjutor, because his long experience, clear brain, logical mind and courteous manner combined could not fail to bring valuable assistance in all difficult and perplexing questions involved. Mr. Douglass was not brilliant as an advocate before a jury, but he was learned in both branches of the law, and his presentation of his view of legal questions before the court was always clear and forcible, indicating thorough study and careful preparation in his office, and the consequence was a deserved success and equal standing among his compeers, who stood in the very front rank of the Bar of Detroit. May he live to a green old age, to enjoy the measure of success which he has so deservedly won.

GEORGE V. N. LOTHROP was born in Easton, Massachusetts, August 8, 1817, and passed his boyhood on his father's farm. He was admitted to the freshman class of Amherst College in 1833; spent one year in that institution, but in 1835 entered the sophomore class in Brown University, R. I., where he graduated in the classical department in 1838.

With very little delay he began the study of the law at Harvard Law School, Cambridge, but on account of ill health he desisted from study for a time and went to Schoolcraft, Kalamazoo County, Michigan, in the fall of 1839, where his elder brother, Edwin H. Lothrop, had previously become a prairie farmer on a large scale, and he became a member of his family. For about two years he pursued an active life in the open air in pursuit of health; with his brother went to Ohio to aid him in purchasing and driving a flock of sheep to Schoolcraft, with which to stock the new and fertile farm in the new state.

Even thus early in life Mr. Lothrop must have been rooted and

grounded in his faith as a democrat, for it is well known to those who recall the exciting political campaign of 1840, during which one side in the contest sang so much about "Tippecanoe and Tyler too," that the young gentleman, who was resting for the time, was requested by the democratic county committee of Kalamazoo County to prepare an address to the voters of that county upon the issue then involved. This duty was faithfully performed, and the voters of Kalamazoo County learned from the local press of the day to whom they were indebted for the earnest appeal then made to them.

Returning to Massachusetts early in 1841, he remained for more than a year. but his return to Detroit was early in the spring of 1843, where he resumed his legal studies in the office of Joy & Porter; was admitted to the Bar of Detroit in the fall of that year and very soon entered into partnership with D. Bethune Duffield, who was a few years younger, but was admitted to practice about the same time. The firm name was Lothrop & Duffield, and under that name these men carried on a successful business until 1856.

Mr. Lothrop very soon became noted not only as a learned and able lawyer, but also a superior advocate at the bar, and his arguments before juries upon questions of fact were always clearly and forcibly presented, and were listened to in important cases very attentively. Within a few years his familiarity with chancery law as applied to its practice in Michigan, became well known to all the leading practitioners in Detroit, and he was surpassed by none of his peers in this line. In April, 1848, he was appointed attorney general of the state by Gov. Ransom, whose home was in Kalamazoo, and who must have formed the acquaintance of the student at law when he was there in 1840, at the time when Judge Ransom was on the bench.

Mr. Lothrop's persuasive powers were soon so cultivated that he was frequently retained as counsel in the defense of persons charged with high crimes; and when notice had been given that he was about to address a jury in an important case, the court-room was sure to be packed.

It has been previously stated that his partnership with D. Bethune Duffield continued until about the year 1856, when Mr. Lothrop became permanent counsel of the Michigan Central Railroad Company, and nearly abandoned all private business, though I recall that several years afterwards he was counsel with D. B. Duffield in the trial of the noted Jackson will case, the validity of which was most strongly assailed by Mr. Bishop, but successfully defended by Mr. Lothrop, during a jury trial which lasted several days.

The tri-centenary of the birth of William Shakespeare was celebrated in 1864, in Detroit, and Mr. Lothrop was selected as the speaker upon that interesting occasion. It need scarcely be said that his address delivered in the Young Men's Hall on the eventful day sparkled with flashes of

wit concerning the "myriad minded" man, whose many and varied works show such a wide acquaintance with the legal works, which it had been the life work of the speaker and his associates throughout their professional career to understand and explain to others.

In May 1885 he was honored by the President of the United States, Grover Cleveland, with the appointment of minister plenipotentiary to Russia, and as the ambassador from this country he spent about three and one-half years abroad, but resigned his position and returned to his home in September, 1888, where he has since remained mostly in private life. He is, however, the president of the bar association, which he has long adorned, and generally present at its meetings, lending his dignity and urbanity to the occasion.

If the winged words of Pallas-Athene addressed to Odysseus in Bryant's vivid translation: "Thou art the first of living men in counsel and in speech" were to be applied to any one of the worthiest among the surviving members of the Detroit Bar, to whom of them all could they more fitly apply than to George V. N. Lothrop?

I have given a great deal of time and thought to the preparation of the foregoing paper, and I desire to acknowledge that I have received much assistance from members of the bar who have aided in furnishing facts incorporated therein; but I desire to especially express my obligation to Mr. E. C. Hinsdale who has rendered me most efficient aid both in looking up material and putting the same into form.

COMPARISON OF WRITINGS IN RESPECT TO PECULIARITIES OF ORTHOGRAPHY.

JOHN B. CLAYBERG.

There is, doubtless, a conflict of authority upon the proposition, as to whether, in absence of statutory enactment, writings having no relevancy to the issues may be proven and introduced in evidence, for the sole purpose of creating a standard for the comparison of the handwriting by juxtaposition, with disputed documents relative to the issue, with a view to determine the genuineness or falsity of the latter.

Some jurisdictions exclude such writings, following the doctrine as established in England prior to the Act of Parliament of 1854 (which allowed the introduction of such standards), while others have refused to adopt such stringent rule, and have announced the more liberal doctrine, allowing the introduction of standards for the purpose of comparison, under various requirements as to proof of genuineness of such standards, and under various rules as to the manner in which and the persons by whom the comparison may be made.

Whatever may be the condition of the law in reference to this proposition, the authorities are almost uniform in holding that irrelevant writings may be proven and introduced as evidence, for the purpose of comparison with a disputed document, in respect to any peculiarities of spelling. Even in jurisdictions where the old English rule is adopted and enforced, this principle is recognized. The basis of this doctrine seems to be, that it is allowing the proof of a material fact to be made by the best evidence obtainable. If, in the disputed instrument, certain words are wrongly spelled, and it is a fact that the person alleged to be the author mis-spells the same words whenever he makes use of them; such fact tends to prove the authorship of the disputed writing; the more numerous the mis-spelled words, the more cogent the proof, for the reason that while two or more persons may mis-spell one word in the same manner, it is less probable that they will mis-spell two or more words in the same manner. If many words are mis-spelled, and proof can be made of many instances in which such words have been used, and it can be shown that such words have always been mis-spelled in the same manner, the identity of the authorship is shown almost to a demonstration. The existence of the habit or peculiarity of a party in mis-spelling certain words, under such circumstances, must tend to prove the authorship of the disputed writing, and proof of that habit or peculiarity would surely be admissible. This evidence might be given by witnesses who were familiar with the fact,

their testimony being based upon the recollection of having seen writings made by the person, in which the words existed mis-spelled in the same manner. If such testimony would be admissible, the introduction of the letters themselves, showing the mis-spelling, would surely be admissible. It would be stronger proof, and more nearly approach primary evidence, certainly being more convincing than the mere recollection of the witnesses. It has been almost universally held that the showing of this peculiarity or habit, even by the introduction of the papers in which it occurs, does not conflict with the rule in reference to the comparison of handwriting, and that none of the objections urged against the admission of irrelevant writings in evidence, for the purpose of comparing handwriting, can be urged against the principles upon which this doctrine is based.

The distinction may be somewhat shadowy, and in many instances the proof of habit or peculiarities may generally so nearly approach the comparison of handwriting, as to leave one in doubt as to the rule. In case of spelling, however, the distinction seems very plain. The *character* of the handwriting is always in question on a comparison of handwriting, while on a comparison in respect to spelling no reference is had to it. The word mis-spelled may be in any character or style. The fact to be proven is the *habit* or *peculiarity* of spelling, and while a comparison of handwriting might aid in determining the *authorship* of a disputed writing, it would have no tendency to prove a habit or peculiarity of spelling any particular word or words.

This rule is directly recognized by the following text writers: 1 Wharton on Evidence, Sec. 717; Wharton's Criminal Evidence, Sec. 851; Folkard's Starkie on Libel (Wood's Ed.), 564; Newell on Defamation (Ed. 1890), p. 579; 2 Starkie on Evidence (7th Am. Ed.), star p. 516; Lawson's Expert Evidence, pp. 417, 277-278, and note 1; 2 Taylor on Evidence (8th Ed.), Sec. 1871 and note 2; Rogers on Expert Testimony, Sec. 143. It is also announced in the following cases: *Machin v. Grindon*, 2 Lee's Ec. Rep., 335; *Brookes v. Tichborne*, 20 L. J., Ex. (N. S.) 89; S. C. 2. Eng. L. & Eq., 374; S. C. 5 Exch., 929; *U. S. v Chamberlain*, 12 Blackf., 390; *Yeomans v. Petty*, 13 Stew. Eq., N. J., 495.

In the following cases proof has been allowed of the same general character, with reference to other peculiarities and habits: *Smith v. Fenner*, 1 Gull. 170; *DeCosta v. Pym*, Peak's Law on Evidence, App., 83; *Crisp v. Walpole*, 2 Hagg. Ec. Rep., 535-536.

In *Smith v. Fenner*, evidence was allowed as to the habit of the writer in the use of double hyphens, and the peculiar formation of the letter "t". It was claimed that a certain clause in the will had been altered; but Judge Story says, in the course of the trial: "The plaintiff's counsel offered witnesses acquainted with the handwriting of the scribe who drafted the will, to prove that the altered word was not in his hand-

writing; and the witnesses mainly relied upon the manner of forming the letter 't', and the use of the double hyphens. To rebut this evidence, the defendant offered witnesses who were acquainted also with, and swore to the scribe's handwriting, and who swore that certain deeds, etc., then in their possession, which they produced to the jury, were in the handwriting of the scribe, and contained the peculiarity as to the 't' and the habits observable in the will, and that they had frequently known the scribe to write in this manner."

The plaintiff's counsel objected to the production of these deeds to this jury, because it was a mere comparison of handwriting. The court overruled the objection. "Nothing is clearer than that this is not a mere comparison of handwriting. The witnesses swore as to the facts of peculiarities of handwriting and produced the best possible proof of their own accuracy. The evidence goes completely to rebut the testimony on the other side; and it rests on the same basis as the admission of witnesses to prove handwriting in ordinary cases."

In *DeCosta v. Pym*, the propriety of a witness basing his opinion on the authority of a disputed writing, by a comparison of the misuse of capitals and small letters in it, with the alleged writer's usual correct use of them, was recognized by Lord Kenyon.

In *Crisp v. Walpole*, the court stated the rule of the ecclesiastical courts on application to probate a will, as to the introduction of irrelevant papers, for comparison of handwriting, as follows: "Although such comparison was admissible, it was not of itself sufficient to establish the will, in the absence of other confirmatory testimony." The judge then said, "There are other circumstances unfavorable to the genuineness of the instrument: the day of the month is written *after* the name of the month, whereas it is proved to have been the habit of the deceased almost universally observed by him, to write the day of the month *before* its name. It was also the habit of deceased to write his names of baptism in full length, and not by initials to formal instruments, though not to common letters, but to this codicil there are only the initials of the christened names."

Thus, it appears that other habits and peculiarities may be proven, and such proof is not considered within the rule as to the comparison of handwriting.

Some of the instances in which the rule has been applied as to comparison in respect to spelling, are quite interesting. In *Brookes v. Titchborne*, the action was for libel. The defendant pleaded as a justification, that the plaintiff had sent to the defendant a libel on him, the defendant, in which defendant's name was spelled "Titchborne" instead of "Tichborne." Defendant offered to show that the plaintiff had on other occasions spelt the defendant's name in a similar manner: and for that purpose offered some letters, not in evidence in the case, or relevant to the issue raised in the pleadings, which he proposed to prove were in the

plaintiff's handwriting, and in which defendant's name was so spelt by plaintiff. This evidence was excluded by the trial judge. Verdict passed for plaintiff and defendant obtained a rule *nisi* for a new trial. It was insisted in the argument, upon the return of such rule, that the introduction of such letters, for the purpose offered, would be clearly within the rule excluding irrelevant papers for the purpose of comparison of handwriting. It was contended that the fact, if it existed, could only be proved by general questions, and not by the introduction of other letters. During the argument, Parke, B., said to counsel: "There is no doubt about the relevancy of this evidence in the present case. What you contend is, that the fact can be proved by general question, and not by specimens of handwriting." Counsel replied: "Yes, the mode proposed in the present case lets in all the inconveniences of comparison of handwriting." Parke, B., replied: "It seems to me that the proof of the fact itself is relevant; the only question is as to the proper mode of proof. * * The present case stands on the dividing line, and might be pushed to the length of causing the admissibility of comparison of handwriting. We will take time to consider our judgment."

Afterward Parke, B., delivered the judgment of the court as follows: "On showing cause it was hardly disputed that, if the habit of the plaintiff so to spell the word was proved, it was not some evidence against the plaintiff to show that he wrote the libel; indeed, we think that proposition cannot be disputed, the value of such evidence depending upon the degree of peculiarity in the mode of spelling; and the number of occasions in which the plaintiff had used it; but it was objected that the mode of proof of that habit was improper, and that the habit should be proved as to the character of handwriting, not by producing one or more specimens and comparing them by some witness who was acquainted with it from having seen the party write or corresponding with him. But we think this is not like the case of general style or character of handwriting; the object is not to show similarity in form of letters, and the mode of writing a particular word, but to prove a peculiar mode of spelling words, which might be evidenced by the plaintiff having orally spelt it in a different way, or written in that way once oftener in any sort of character; the more frequently the greater the value of the evidence. For that purpose, one or more specimens of writing by him with that peculiar orthography would be admissible. We are of the opinion, therefore, that this evidence should have been received, and not having been received, the rule for a new trial must be made absolute."

In *United States v. Chamberlain*, on indictment for depositing scurrilous postal cards in the mail, such cards displayed characteristic instances of mis-spelling. It was held competent to prove that other writings of the defendant contained identical errors in spelling, and to introduce them

in evidence for the purpose of connecting the defendant with the cards, which formed the subject of the charge.

Taylor, in his work on evidence, in speaking of the probative value of a comparison of the spelling, says: "This is a test which may often be successfully applied. At the Greenwich county court, a plaintiff on one occasion denied most positively that a receipt produced was in his handwriting. It was thus worded, 'Received the *Hole* of the above.' On being asked to write a sentence in which the word '*whole*' was introduced, he took evident pains to disguise his writing, but he adopted the above phonetic style of spelling, and also persisted in using the capital 'H.' On being subsequently threatened with an indictment for perjury he absconded."

A case is cited in the note to 2 Starkie on Evidence, above referred to, as follows: "On a trial of an issue out of chancery of the county of Palatine of Lancaster, to try whether a document purporting to have been signed by a party deceased, was his genuine signature, different documents proved to have been in his handwriting in which he spelt his name in a different manner, were submitted to the jury for the purpose of comparison, by Gurney, B., after consultation with Aldeson, J., Lancaster Spring Assizes, 1833.

There is an anecdote told by Lord Meadowbank in the year 1839, in the course of his charge to the jury on the trial of Alexander, the claimant to the title of the Earl of Stirling, which may be referred to as showing the probative value of a comparison of mis-spelling, in a controversy over the authenticity of documents: the anecdote also seems to show that in the case referred to by Lord Meadowbank, the court compelled the suspected forger to write at the dictation of the court for the very purpose of comparing what he so wrote with the documents in controversy, and thus to connect him with the authorship of them through similarity of mis-spelling. This evidence is referred to in Wharton's Criminal Evidence (8th Ed.), Sec. 851, as reported in 1 Townshend, Modern State Trials, pp. 465-466.

Lord Meadowbank said: "I recollect of a case of forgery that occurred about thirty years ago—the case of a person named Alexander—and that coincidence in the name has probably brought it my recollection. A tailor in Ayr had learned that a person of that name, and which was also his own, had died leaving considerable property without any apparent heirs existing. He got access to a garret in the family mansion, and it was said, found there a collection of old letters about the family. These he carried off, and with their aid fabricated a whole mass of similar productions, which it was said clearly proved his connection with the family of the deceased, and the Lord Ordinary decided the case in his favor. The case, however, was carried to the Inner House by reclaiming petition. When it came into court, certain circumstances led me, then a young man at the

bar, to doubt the authenticity of the documents. One of the circumstances I recollect was this, that there were a number of words in the letters, purporting to be from different individuals, spelt, or rather I should say, misspelt in the same way, and some of them so very peculiar that on examining them minutely there was no doubt left in my mind that they all came from the same pen, and were all written by the same hand. The case attracted the attention of the Inner House. The party was brought to the clerk's table, and was examined in the presence of the court. He was desired to write to dictation, to the Lord President, then Lord Justice Clark, and it so happened that he misspelt all the words that were misspelt in the letters, in precisely the same way; and this, and other circumstances, proved to a demonstration that he had fabricated all of them himself. He then confessed the truth of his having written the letters on old paper, which if I recollect, he had found in the garret:—and what is instructive, is this, that this result was arrived at in the teeth of the testimony of half-a-dozen engravers all saying that they thought the letters were written by different hands."

Bentham, in his *Rationale of Judicial Evidence*, Book 7, Chapter 4, discusses the modes of what he defines as "deauthentication," meaning thereby to use his own words, "The source from which the persuasion that the document in question is spurious or falsified may be obtained." In this discussion Bentham realizes the essential difference which exists between similarity or dissimilarity of *handwriting*, and similarity and dissimilarity of *spelling*, style and other *peculiarities* and *habits* of the writer. After stating dissimilarity of handwriting as shown in four ways, as one mode of impeaching a writing alleged to be genuine, he states as another mode, "Marks of spuriousness or falsification apparent upon the face of it," among which we find the following: "Seventh. In the script in question the style, phraseology or mode of spelling manifestly dissimilar to those of the individual in question ascertained from other sources. The idea attached to the word 'style' being as yet extremely vague, the indication grounded upon it will be proportionately vague. Another indication that applies principally to written evidence of the casual kind as above." Whether Bentham be considered as authority on strictly legal points he is certainly an authority upon what constitutes relevancy from a logical standpoint.

A further illustration of the probative value of such testimony may be found in the case of *Reid v. State*, 20 Ga., 681. In this case, the authority of a certain letter was in controversy. Mr. Justice Lumpkin said, "One of the main errors alleged, was the method of proving the handwriting of the defendant. Thomas W. Reveire, the owner of a stolen negro, and prosecutor, testified that he procured Reid, the accused, to write in his presence, for the purpose of becoming acquainted with his handwriting; and from his knowledge of it, obtained in this way, he

believes the letter dated 20th of November, 1885, at Milledgeville, to be in James M. Reid's handwriting. He further stated, that there was a peculiarity in his penmanship, both as to the formation of letters and spelling of words, as for instance, always using 'hit' for 'it.' The court proceeded to hold that this mode of proving handwriting was admissible, and then added: "Slightly as counsel treat the identification of orthography, writing 'hit' for 'it' in both documents, it is a pretty decided 'hit' after all."

The following cases are sometimes referred to as announcing a doctrine opposed to the foregoing proposition: *Jackson v. Phillips*, 9 Cow., 94; *State v. Miller*, 47 Wis., 30; *Matlock v. Glover*, 63 Tex., 23; *Beran v. Atlanta National Bank*, 31 N. E., 679.

In *Jackson v. Phillips*, one of the issues was upon the genuineness of a deed. A witness testified that the grantor was a bad writer, and always wrote his name "Abraham barnes", while the signature to the deed was "Abraham Barnes". The witness identified an old account book containing the grantor's name written in the manner testified by her. Counsel offered to prove its genuineness, and the genuineness of the grantor's signature therein contained. The book and signatures were rejected by the court below, on the ground that it would be a comparison of handwriting.

Savage, C. J., in delivering the opinion of the court of appeals, said: "The deed from Barnes to Fowler being properly in evidence showing title out of the lessors, they had a right to show that the deed was a forgery by proper testimony: and they contended that Barnes' account book was proper for that purpose, by way of comparison of handwriting. The rule is settled in England, and I believe in this state, that comparison of hands by juxtaposition of two writings in order to ascertain whether both were written by the same person is inadmissible." No effort was made to introduce the account book and signatures upon the theory of original evidence to show a habit or peculiarity of the grantor in writing his name; nor was such proposition contended for by counsel or considered by the court.

In *State v. Miller*, while the defendant was being examined and questioned generally by the police officers, after his arrest, concerning his participation in the crime charged, a letter, supposed to have been written by him, containing threats of arson was repeated in his hearing; and he was requested to write, and did write on another paper the same words in the presence of such officers: the original letter was repeated, and contained words of peculiar form and style of orthography, and the copy so made was in its orthography a *fac-simile* of the original. Such officers, as witnesses on the trial, produced such copy while testifying to the admissions of the defendant in such examination, and it was received in evidence and submitted to the jury for the purpose of comparison with the original letter, and determining thereby the authenticity of the same.

The state recognizing the rule then established in Wisconsin, that only papers in evidence in the case could be used for comparison, offered this writing as a confession or admission of the defendant, for the purpose of having it in the case, so that comparison might be made, under the rule. It was not offered on the theory of original evidence to show a habit or peculiarity in orthography. No such proposition was discussed by counsel, or considered by the court. Counsel stated that if it was not in the case for some other purpose no comparison could be made, and the supreme court held that it not being admissible as a confession, it was not properly in the case and no comparison could be made relying solely on the law relative to comparison of handwriting.

In *Mullock v. Glover*, the question of the forgery of certain papers was sought to be raised; and to prove such forgery, counsel offered in evidence certain letters for comparison of handwriting and spelling. They were objected to as *irrelevant*, and not because they would not be *competent* testimony, if the fact itself were relevant. The court determined that the liability was fixed, even if the paper was a forgery. The question of *competency* of the proof was not passed upon, but only the *relevancy* of the offered proof, to the issue.

In *Bevan v. Atlantic National Bank*, one of the issues was as to the genuineness of a signature of a deceased person to a note. One witness, who had testified on direct examination that he believed the signature was genuine, was shown other notes by the deceased, by the name of "Allie Williams", while the disputed signature was "Alice Williams", and asked if he based his opinion upon having seen the deceased sign these particular papers. Counsel offered to prove the genuineness of the notes, and that deceased signed her name "Allie Williams" to all important papers, and then sought to introduce the other notes in evidence. Objection was made and sustained to the questions, and to the introduction of the proof proposed. The supreme court decided that there was error in excluding the questions on cross examination, as they tended to test the accuracy of the information of the witness as to the genuineness of the disputed signature; but there was no error in excluding the documents from evidence. The court said: "We perceive no ground upon which the notes were admissible in evidence. The law is well settled in this state that the genuineness of a signature to a note or other instrument in writing cannot be proved or disproved by comparing it with another signature admitted to be the signature." In this, as in the other cases, above quoted, the papers were not offered upon the theory of proving a habit or peculiarity. and the court makes no reference to such theory.

All of these cases can only be construed as authorities against the proposition, because of their silence.

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THE Michigan State Bar Association will meet in the supreme court room at Lansing on Tuesday, January 17, for the purpose of framing a bill for the relief of the supreme court, to be presented to the governor and legislature.

OUR leading article this month, "The Detroit Bar," was written by the Hon. Charles I. Walker, upon the invitation of the Detroit Bar Association. Such an article is valuable chiefly to the attorneys residing in Detroit, but there is much in it that is of interest to many lawyers throughout the state who have had official or personal relations with the distinguished members of the Detroit bar who have passed away. Judge Walker is himself not among the least distinguished of the living members of the Detroit bar. He is seventy-eight years of age, having been born at Butternuts, New York, April 25, 1814. He went to Grand Rapids to take up his residence, the second city of the state being then a village of five or six hundred inhabitants. In 1838 he was elected a justice of the peace and in 1840 a member of the legislature. In 1841 he removed to Springfield, Mass., and later entered into a partnership with Hon. Dan Bradley, of Brattleboro, Vt. In 1851 he returned to Michigan and entered into a partnership with his brother E. C. Walker at Detroit, and in 1853 Hon. Alfred Russell was admitted into the firm, changing the name to Walker & Russell. Judge Walker withdrew from the firm in 1857, and since that time has practiced his profession alone. The paper which we publish in this JOURNAL possesses great value because it comes from the pen of one who has taken an especial interest in the early history of Michigan and Detroit, and who has written much which has shown a deep insight into this history. In 1859 Judge Walker became professor of law in the law department of the University of Michigan, which position he held for fifteen years. He was judge of the Wayne circuit court for ten months in 1867.

THE Hon. John B. Clayberg, of Helena, Mont., who contributes the excellent article, "Comparison of Writings in respect to Peculiarities of Orthography," in this number, graduated from the law department of the U. of M. in '75. He was in the law office of Judge Cooley for a time, and then became a member of the firm of Kilburn & Clayberg, at Lansing, Mich., where he practiced two years. He then went to Alpena, Mich., where he remained until 1884, when he went to Helena, Mont., and became associated with the firm of McConnell, Carter & Clayberg. In 1888 Mr. Clayberg was appointed Attorney General, being the last incumbent of that office while Montana was a territory. He is the non-resident lecturer on mining law at the University of Michigan.

SEVERAL interesting questions will confront the supreme court when they consider the somewhat celebrated Leonard case, which has occupied considerable of the time of the Kent County probate and circuit courts during the past few weeks. The probate court appointed the Michigan Trust Company guardian of the estate of Fred H. Leonard, an alleged mentally incompetent person. Mr. Leonard's attorneys claim this appointment was void because the probate judge is a stockholder in the Michigan Trust Company. They also claim that the statute authorizing the Michigan Trust Company to act as executor, guardian, administrator, etc., is unconstitutional, the two main reasons assigned being: (1) that the legislature cannot legally appoint a corporation as the guardian of the person of an individual; (2) that the depositing of a guaranty fund in the state treasury cannot be made a substitute for bonds in individual cases. The result of the deliberations in the higher court will be awaited with considerable interest.

HENRY WOLLMAN, class of '78, law department, delivered a very valuable address on "Corporations" before the Kansas City Bar Association at the first annual meeting of that body on November 18. Mr. Wollman, although a young man, is one of the most distinguished of Michigan's graduates in the West. He has risen rapidly in the profession of the law, and is now looked upon as one of the foremost attorneys at the bar of Missouri. He is president of the Kansas City alumni association of the University of Michigan, a very active and loyal body of graduates. Mr. Wollman, in the course of his address, says: "The corporation laws of most of the states are loose, lax, and of little real value," to which we say, "Amen!"

AN interesting decision upon the construction of wills and descent of property was rendered by the supreme court of appeals of Virginia in *Gish v. Moomaw*, September 22, reported in full in a recent number of the *Virginia Law Journal*. A will provided that, after paying testator's debts, all his real and personal estate should go to his wife for life, and, on her death, the real estate should be equally divided among his three brothers "or their heirs, if living"; but if either of the brothers should die "without heirs before the division of the estate, the property should go to those living or their heirs." The court held that at the testator's death the brothers each took a vested remainder, in fee simple, in an undivided third of the real estate, defeasible only by death without issue before the termination of the life estate, in which event the property was to pass to the survivors.

MEDICO-LEGAL students will be interested in the line of investigation being pursued by the New York State Homœopathic Medical Society. This society has been inquiring into the causes of hereditary insanity and has been discussing plans for legislation which will prevent "the increase of the unfit." Is it wise to enact laws to prevent marriages, in which one or both of the contracting parties suffer from want of mental capacity to such a degree that the same symptoms are liable to re-appear in the offspring? In other words, can the spread of hereditary disease be checked by legislation? This is a problem of medical jurisprudence which will demand solution at no distant time. It is a fact which the doctor apprehends quicker than the lawyer, that medical theories concerning insanity have progressed, while the common law, touching insanity and hereditary diseases generally, is to this day framed upon the medical theories which obtained centuries ago. The effort of the New York State Homœopathic Medical Society to secure preventive legislation is simply a recognition of the fact that the old medical theories are no longer tenable. The legislative committee was directed to place before the legislature the evil results of marriage among those tainted with hereditary crime, insanity, disease or alcoholism, and demand the enactment of suitable laws in restraint of such marriages. Just how these laws would be enforced it is left for the law-makers to determine. Probably the only effective legislation would be the passing of acts making such marriages penal and criminal in a high degree.

ATTENTION is called to the notice on another page of the meeting of the Michigan State Bar Association in the supreme court room at Lansing on Tuesday, January 17, 1893. The meeting is an adjourned one, and is called for the purpose of discussing the bill, prepared by the standing committee on jurisprudence and law reform, for the relief of the supreme court. It is an important matter to the lawyers of the state, and even more important to the people of the state, whose interests are directly affected. Every attorney who practices or expects to practice before the supreme court should be interested in any measure which will render the administration of justice in that court more certain and speedy. It is a matter of common knowledge that the business of the court is clogged by an accumulation of cases, to clear away which would occupy the energy and capacity of the most capable and hard-working body of judges in existence. It is impossible to keep abreast of the work, and radical measures are necessary in order to relieve the already over-worked judges. The people naturally look to the bar of the state to frame a measure which will afford such relief. It is highly important that no mistake be made in framing a bill, and it is especially to be desired that the bill be the result of, and be backed by, the united effort and intelligence of the bar of Michigan. To this end a large and representative attendance is urged for the meeting of the association. An invitation is also extended to lawyers and others who do not chance to be members of the state bar association, to attend the meeting and contribute their aid in the framing of a proper measure. Several plans or schemes have been spoken of, and each will have its advocates, but we feel assured that out of all will be evolved a bill that will remedy the evil and recommend itself to the good sense of the governor and legislature. It is an important matter and every sacrifice should be made to ensure a large attendance at the meeting.

NEW SUPREME AND CIRCUIT COURT RULES.—The attention of our subscribers in Michigan is called to the following new rules, now in effect:

Supreme Court Rule 31. The party removing a cause into the supreme court, by writ of error, appeal, certiorari, case made, or otherwise, shall prepare a case for the use of court and counsel, which, except in chancery appeals, shall contain the whole record, case or proceedings upon which the case is to be heard; and in chancery cases, shall contain the whole return except the formal parts, but in cases brought up on writ of error, the printed record shall contain the bill of exceptions and such parts of the record only as are necessary to present the questions raised. All records, arguments and briefs printed for the use of this court shall be in small pica type, 24 pica "ems" to a line, thirty-five lines to a page, leaded with four-to-pica leads. The records shall contain an index and have a suitable cover containing the title of the court and the cause, and the court from which the case is brought into this court. The size of the pages of the records and briefs to be 9½ by 6½ inches. *As amended December 3, 1892.*

Circuit Court Rule 85. Whenever exceptions are taken on trial of a cause to any decision or ruling of the court, the party taking such exceptions shall prepare a brief statement of so many of the facts as may be necessary to show the grounds of such exception, and to enable the court above rightly to understand the same, and shall give notice to the opposite party when and where such exceptions will be settled by the circuit judge, which notice shall be for some day during the term at which the trial was had, unless the court or circuit judge shall otherwise order. The bill of exceptions shall contain only such parts of the testimony as are necessary to present the questions of law raised and shall be in narrative form unless the trial court shall determine it necessary to a full understanding of the questions, that it be set out by questions and answers. (Ordered to take effect January 1, 1893.) *As amended Dec. 3, 1892.*

THE New York State Bar Association will hold its annual meeting at Albany on January 17 and 18. The association has doubled its membership during the past year. Indeed, there seems to be a general awakening throughout the country among lawyers who are recognizing the importance of these organizations, not only to the profession, but to the people who look to lawyers to exercise a protecting oversight over legislation. State and local bar associations are springing into existence all over the Union, and those that are already organized are receiving large additions to their membership rolls. Michigan has not been behind in this work, for within the past five months, since the last annual meeting in Grand Rapids, sixty-five new members have joined the Michigan State Bar Association. The New York State Bar Association will have an interesting annual meeting. Under an amendment to the constitution of the association, adopted at the last annual meeting, for the purpose of rendering it possible for the association to do more and better work in the interest of law reform, the executive committee and the committee on law reform are required to meet prior to December 1 and prepare a program of subjects for the next annual meeting, to give notice of these subjects to the members so that they may be prepared to discuss them intelligently. This is an excellent idea, and could be adopted with profit by the Michigan State Bar Association. The program for the meeting includes the discussion of a plan having in view the stereotyping of all bills passed by the legislature, before they go to the governor, instead of engrossing them. This is chiefly

advisable because it will render impossible frauds and errors in engrossing bills. The time and method of electing delegates to the constitutional convention will also be discussed. Another important subject is the matter of uniform examinations for law students who desire to be admitted to the bar. There are now five examining boards in New York state, and by some the examinations are loosely conducted; by others they are difficult, strict and severe. It is the idea of the state bar association to establish a board of examination for the whole state. Judge Brewer, of the U. S. Supreme Court, will deliver the annual address, and Governor Flower will tender the association a reception, which will take the place of the banquet. The New York State Bar Association is a strong, vigorous body, and it always has been an effective instrument for good in the profession. We wish it a successful and enthusiastic meeting.

It is a matter of regret to the profession that there is no method of preserving the opinions of circuit judges in this state. Although these opinions are not vested with the authoritative character of supreme court opinions, simply because they are not delivered in courts of last resort, yet very many of them are fully as valuable, as discussions of interesting and important questions of law, as any of the opinions handed down by justices of the supreme court. No one will question but that there is as much legal ability on the circuit as on the supreme bench, in this state. A number of circuit judges have heretofore been chosen to the supreme court, although this has not been the practice of recent years. The supreme court opinions are not more thorough than those delivered in circuit courts, because the supreme court justices are, and have been for years, hurried in their work by reason of the accumulation of cases. Many of the circuit judges, on the other hand, are not pressed with work, and are able to prepare their opinions carefully and thoroughly. If their opinions were produced in permanent form, and carefully selected, they would be valuable aids to the practicing lawyer in the preparation of cases. There is no reason, either, why they should not possess a certain authority as precedent, although not coming from courts of last resort.

Such an opinion is that delivered by Hon. John W. Stone, circuit judge of the twenty-fifth judicial circuit, Marquette, in the case of *Jacobs v. Marquette City and Presque Isle Ry. Co.* This was an application for an injunction to prevent the construction of an electric street railway in front of complainant's property. A restraining order was granted. The injunction was refused, however, and the restraining order dissolved. Judge Stone's opinion is chiefly valuable because of the comprehensive review of the Michigan cases, by which it is shown that the Michigan law upon the points involved is thoroughly established. In his opinion he discusses the well known case of *Grand Rapids and Indiana R. R. Co. v. Heisel*, 38 Mich., 66, quoting from Judge Cooley's luminous opinion. Other cases cited and discussed were: *Grand Rapids Street Railways*, 48 Mich., 433; *Potter v. Street Railway*, 83 Mich., 285; *Detroit City Railway v. Mills*, 85 Mich., 634; *People v. Ft. Wayne and Erie Ry. Co.*, 52 N. W. Rep., 1010, Michigan Supreme Court, July 28, 1892. Judge Stone arrives at the conclusion that the construction of a street-railway cannot be enjoined, but that the complainant must seek his remedy in an action at law for damages. There was another point involved as to the right of the company to occupy the streets under an ordinance, the court

deciding that the legislature could confer these rights independent of the city charter, or that the council could confer the right when permitted by its charter.

As we have said above this opinion is a valuable one because of the complete and elaborate discussion of the Michigan law upon the question involved. There should be some method by which it, and many others of as great a degree of excellence, could be preserved in permanent form for the use of the profession.

WHAT CONSTITUTES A GAMING ROOM? — The case of *People v. Weithoff*, in the supreme court of this state, decided December 2. 1892, an abstract of which appears upon another page, should be read by every prosecuting attorney in the state. The law is there laid down by Justice Montgomery, defining what constitutes a gaming room under Howell's Statutes, section 2029. Another somewhat similar case was that of *People v. Weithoff*, reported in 51 Mich., 203. In the recent case it is urged for the defense that no actual betting occurred on the premises, that the defendant had no greater responsibility for the bets than the servant of a telegraph company who sends dispatches directing that money be wagered, and that as no bet or wager is actually made in the room, it is not a gaming room. The court holds, however, that this contention ignores the real substance of the transaction; that the money is placed in the hands of the defendant by one party to the wager, and if he wins he becomes the money man in this room, and if he loses it, knowledge of the loss is brought to him in this room. The court emphasizes the decision as follows: "It would be a reproach to the law if it were possible that responsibility could be evaded by any such subterfuge as is apparent in the very scheme adopted by the respondent in this case. That the purpose in fitting up this room was to furnish the information which enables persons to exercise their judgment in laying wagers; that money is paid into the hands of defendant irrevocably to wager it, and that the gains or losses of the wager are paid to those making bets within the room, is beyond question. We think this constitutes the room a gaming room within the meaning of this statute."

One of the leading hotels of the city of Grand Rapids furnishes an instance similar in many respects to the recent case in the supreme court. Indeed, the facts constitute a much clearer case of violation of the statute relating to the keeping of a gaming room. The proprietors of this hotel permitted certain persons to sell pools during the recent national election, in the billiard hall of their hotel, and to place there all the paraphernalia of a gaming room. The betting upon the result of the election was unquestionably "a game of chance" within the meaning of the statute, and the proprietors of the hotel were guilty of a misdemeanor in even greater degree than *Weithoff*, the defendant in the recent case in the supreme court. The statute, covering the case in Grand Rapids, is as follows: "Any person . . . who shall knowingly suffer a gaming room, or gaming table, or any such game, to be kept, maintained or played on any premises occupied or controlled by him, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both, in the discretion of the court." Betting upon elections is as much a game of chance as betting on horse-races. It is extremely pertinent to inquire whether the prosecuting attorney of Kent county did his duty in failing

to bring the proprietors of the leading Grand Rapids hotel to account for violation of this statute?

In *People v. Weithoff*, 51 Mich., 203. the defense was that selling pools was not "gaming" but "betting." Judge Cooley in one of his characteristic opinions reviews all the legislation of the state bearing upon gaming and betting and comes to the conclusion that no "sharp distinction has at any time been drawn between betting and gaming." He finds that pooling schemes contemplate gaming, and that the room in which the pools are sold and the gaming thereby aided and facilitated is a gaming room within the meaning of the statute.

RELIEF OF THE SUPREME COURT.—The committee of the State Bar Association, appointed to report some measure for the relief of the Supreme Court, met at the office of the chairman, Hon. T. J. O'Brien, in Grand Rapids, Thursday, December 22. Three measures were considered, viz: (1) To limit the cases going to the Supreme Court to those in which the controversy involves more than \$300; (2) to increase the number of judges of the Supreme Court; (3) to create one or more appellate courts, to have exclusive jurisdiction of all matters coming from the lower courts in which the amount in controversy does not exceed \$500, excepting cases involving the construction of the constitution, personal liberty and divorce matters.

The chairman of the committee was delegated to request the outgoing and incoming Governors to give the matter special attention in their messages. The committee did not see fit to recommend either plan to the meeting of the Bar Association, to be held in Lansing, January 17, but each of the committee were strongly in favor of the plan of establishing an intermediate Appellate Court. In speaking of the matter Chairman O'Brien said:

"The later plan would probably take from the Supreme Court nearly one-half its business, and the five judges composing that court would be able, for a great many years to come, to keep up with the business. The plan would also have the merit of being cheap, the idea being that parties would not be required to print their records, and, except in rare cases, the opinions to be filed would not be published. The plan would be to make the compensation of the judges of the Appellate Court sufficient to attract first-class lawyers, and it is claimed that a court composed of three capable lawyers would in this class of cases come about as near what would be right as the Supreme Court—and would certainly come as nearly right as the latter court in its present crowded and hurried condition. If the plan of appellate courts should meet with favor it would probably be composed of three judges, and when the business should warrant it, one or more additional courts of a like kind could be added. In that case it might be best to have them located in different parts of the state."

Many things can certainly be said in favor of this plan, and it is quite likely to receive the favorable consideration of the members of the Bar Association. Should they see fit to recommend such a plan to the Legislature, a law establishing such a court will in all probability be passed. It is a matter of vital importance, and every member of the association should be present.

NOTES OF RECENT MICHIGAN DECISIONS.

ATTACHMENT—EFFECT OF CERTIORARI.—The effect of suing out a certiorari, and giving the statutory bond for the payment of any judgment that may be rendered in the circuit court, is to dissolve an attachment. (*Bush v. Raths*, 45 Mich., 185). Moreover, if the evidence shows a sale of the property before the levy of attachment, though the writ may have been valid when the demand was made, the defendant can only justify his holding on the ground that the transfer to the plaintiff was fraudulent, which is a question for the jury. *Vanderhoof v. Pendergast* (Dec. 2. Montgomery, J.)

EASEMENT—RIGHT OF WAY—When the complainant rests the title upon a reservation in a deed of "the perpetual right of way for a private way through on the south side of said lot," (1) the case falls properly under the jurisdiction of an equity court, as no action for damages could give adequate redress to a party who has no peaceable egress from his farm; (2) such right of way is appurtenant to the land, and not *in gross*, as the word "heirs" is not employed; (3) a mere non-user for twenty years will not extinguish an easement. If such non-user is not accompanied by acts which show an intention of abandonment, adverse possession as well as non-user are required to effect this extinguishment. *Lothrop v. Elsnor*, (Dec. 2. Montgomery, J.)

EVIDENCE—COMPETENCY OF SALOON-KEEPERS.—Where the prosecuting attorney asks of a witness, "are you in the habit of drinking?" and after receiving an affirmative reply states to the jury that a saloon-keeper and a man who drinks are neither to be believed, the court should instruct the jury to disregard such language. Admitting the testimony, under objection, must have convinced the jury that the inquiry was material as bearing upon the credibility of the witness. The testimony of saloon-keepers or of persons who drink is not necessarily to be disregarded. *People v. Kahler*. (Dec 2. McGrath, J.)

GIFTS DURING LIFE TIME—PROOF OF AFTER DONOR'S DEATH.—A widow holds notes, which she claims were given her by her husband during his life, and had been examined in the probate and circuit courts, as to the history of said notes, the heirs cannot be allowed to go into matters equally within the knowledge of the deceased so far as they deemed necessary to charge her with these notes, and then revive her disability so as to prevent her giving the entire history of the transaction and thus explain what had been drawn out by counsel for the heirs. *Dunlap v. Dunlap*. (Dec. 3. McGrath, J.)

HIGHWAY TAXES, HOW ASSESSED.—§ 1325 How. Stat., *et seq.*, must be construed as contemplating that each district should bear its own burdens, and moneys collected from certain districts should not be expended in others. The assessment should be made upon those districts from which balances are due, and not upon the community generally. *McFarlane v. Township of Cedar Creek*. (December 2. McGrath, C. J.)

IMPLIED LEASE OF PREMISES.—In *Fisher v. Pforzheimer* (Dec. 2. Montgomery, J.) the defendants held a chattel mortgage of goods kept in leased premises, and placed an agent in charge of said goods. The plaintiff sought to hold the defendants for the rents on the grounds, (1) of occupancy, (2) of an implied agreement. But the court held that the defendants were occupants, if at all, under the lease, and were simply agents to protect their interests, and that no agreement to be responsible for the rent could be implied from such a state of facts.

LOCAL OPTION LAW, VALIDITY OF PROCEEDINGS UNDER.—Unsigned and unauthenticated proceedings of the board of supervisors cannot be held to be a record, such as Act No. 307, Pub. Acts 1889, requires to be made in order to give effect to its provisions, and put the law in operation; hence a county treasurer cannot justify his refusal to accept \$500 and approved bond for a liquor tax under such irregular proceedings of the supervisors. *Covert v. Munson*. (Dec. 2. Per curiam.)

MASTER AND SERVANT—LIABILITY FOR INJURY TO SERVANT BECAUSE OF HIS INEXPERIENCE.—Where a brakeman has been injured in coupling cars, he cannot hold the railroad company liable on the ground that they knew of his inexperience, and thereby became insurers against injury to him. A person entering upon an employment incurs all the hazards incident thereto, and he cannot claim damages for injuries resulting from his inexperience. *Dysinger v. C. S. & M. R. R. Co.* (Dec. 2. McGrath, J.)

MISREPRESENTATIONS IN APPLICATIONS FOR INSURANCE, WHEN COMPANY ESTOPPED FROM SETTING UP.—In *Robison v. Ohio Farmers' Insurance Co.*, (December 2, Montgomery, J.) the insurance company claimed in defense to an action upon a policy, that the assured represented that he was the absolute owner of the property, which was a false statement. The assured had an insurable interest, however, and the agent of the company was fully cognizant of the true state of the title. The court therefore held that the company was estopped from asserting that it was misled by the statements contained in the application, even though it be expressly stated in the application that the applicant declares and warrants the answers to be true, and agrees that the declaration shall be the basis of and formed part of the contract with the company. A similar decision was rendered in *Beebe v. Ohio Farmers' Insurance Co.*, decided during present term, and in *Crouse v. Hartford Ins. Co.*, 79 Mich., 249; *Kitchen v. Hartford Ins. Co.*, 57 Mich., 135, and *Westchester Ins. Co. v. Earle*, 33 Mich., 143.

NEGLIGENCE — STEPPING FROM A CAR IN MOTION. — In a suit for damages against a railroad company for an injury caused by the train starting while the plaintiff was attempting to alight, (1) it is sufficient to allege in the declaration that the train started before the plaintiff had reasonable time to safely alight; (2) it is not fatal variance to allege that the plaintiff stood on the lower steps of the car, while the proof is that he stood near the door when the car started; (3) it is not negligence *per se* for a passenger to alight from a train after it has stopped and he has been invited to alight, and while doing so the train is again started, and especially when the brakeman or conductor is standing upon the ground inviting and assisting him, unless the speed of the train is such that the danger is obvious. *McCuslin v. L. S. & M. S. Ry. Co.* (Dec. 2. Grant, J.)

PROPER NOTICE OF DISSOLUTION OF PARTNERSHIP.—Victoria Eckhardt was a member of the firm of Heck, Hemel & Eckhardt. She permitted Heck to execute a number of notes to the Parsons Lumber Company, in the firm name. Several of these notes were executed after she had withdrawn from the partnership and published notice of dissolution in the Detroit papers, and it was sought to hold her liable upon them. The court (*Sibley et al. v. Parsons et al.*, Long, J., December 2), held that she was liable on those notes, as it appeared that the Parsons Lumber Company had not seen the notice of dissolution in the Detroit papers, Detroit being one hundred miles from their place of business; and that it was her duty, inasmuch as she permitted Heck to act for the firm and the Parsons Lumber Company had been accustomed to doing business with the firm through Heck, to give the Parsons Lumber Company direct notice of the dissolution of the firm and her withdrawal from it. *Grover v. Henry*, 16 Am. Dec., 47 (16 Conn., 701). Notice in a newspaper is not sufficient when persons have dealings with the firm dissolved.

STREET RAILWAY COMPANY'S LIABILITY TO TRANSFER PASSENGERS.—Where a passenger is transferred from one car to another he must produce other evidence than his mere statement that he is entitled to ride. If he has paid his fare to some other authorized agent of the company, he must secure evidence of such payment or pay the conductor when fare is demanded. *Mahoney v. Detroit City Ry. Co.* (Dec. 2. Grant, J.)

VERDICT, MISTAKES IN, HOW CORRECTED.—Where a jury agrees upon a verdict of \$968, but the foreman in rendering the verdict makes a return of \$800, and neglects to mention \$168 allowed as interest thereupon, it is incompetent to amend the record of the verdict and judgment by adding thereto \$168 interest, making the amount of the verdict read \$968, instead of \$800. There is no warrant for correcting a verdict after the discharge of a jury. Such a practice is open to serious objection and gross abuse. The only remedy in such cases is a motion for a new trial. *Parker v. L. S. & M. S. R. R. Co.* (Dec. 2, McGrath, J.)

WHAT CONSTITUTES SODOMY.—The effect of the repeal of the statutory enactment of 1841 revives the common law, and hence proof of emission is a necessary ingredient to the offense of sodomy; but it may be inferred from proof of penetration, and other circumstances of the case. *People v. Hodgkin* (Dec. 2. Montgomery, J.)

WHAT CONSTITUTES A GAMING ROOM?—This question was answered as to a particular case, in *People v. Weithoff* (December 2, Montgomery, J.), the defendant being prosecuted under How. Stat., section 2029, which reads, "Any person who shall for hire, gain or reward, keep or maintain a gaming room, or a gaming table, or any game of skill or chance, or partly of skill and partly of chance, . . . shall be deemed guilty of a misdemeanor." The defendant occupied and maintained a room, kept a telegraph operator therein, and for a commission paid by any person telegraphed to Guttenburg, New Jersey, the amount of money the person desired to bet and the name of the horse chosen by him in the race at Guttenburg, receiving therefor a certain commission. The court held it a

gaming room, under the statute, citing *People v. Weithoff*, 51 Mich., 203, where the statute is exhaustively discussed; and distinguishing *People v. Wynn*, 12 N. Y. Supp., 379, the case relied upon by the defense. [See editorial discussion.]

WHAT CONSTITUTES SURETYSHIP.—An interesting and close distinction between a surety and principal debtor was drawn in *Shufelt v. Coolidge*, (December 2, McGrath, C. J.) A judgment had been rendered against one Moore, principal in a certain note, and Coolidge, surety on same. To pay this judgment, Moore gave another note, requesting Coolidge to again sign as surety. The latter refused to become sole surety, and Shufelt's signature was also obtained. About the time the note fell due Coolidge paid one-half of it to the bank, which then held and owned it. The bank then sued Moore, Shufelt and Coolidge for the balance and obtained judgment. This Shufelt, finally paid and sought to recover the amount from Coolidge, claiming that inasmuch as the note in question was given to pay a judgment against both Moore and Coolidge, the latter must be treated as principal and not as a co-surety. But the court held that, while it may be true that as between plaintiffs in the former suit and Coolidge, the relation of suretyship ceased when judgment was entered, and his liability to plaintiff became that of a principal judgment debtor, yet the same was not true as between Moore the principal and Coolidge the accommodation indorser. Their relations were undisturbed. The old judgment must be regarded as Moore's debt, so far as the parties in the present case are concerned, and the relation of Shufelt and Coolidge to the note in question as that of co-sureties.

MICHIGAN STATE BAR ASSOCIATION.

The Michigan State Bar Association, at the annual meeting held at Grand Rapids, July 26, 1892, decided to present a bill for the relief of the supreme court to the governor and legislature, at the session of 1893. The matter was referred to the standing committee on jurisprudence and law reform with instructions to prepare such a bill and submit it to an adjourned meeting of the association. The annual meeting adjourned to the third Tuesday in January, 1893, being January 17. The state bar association is therefore called to meet at Lansing, in the supreme court room, at 2:30 o'clock, Tuesday, January 17. A large attendance of the members of the association is earnestly desired, and a special invitation is extended to attorneys who are not members of the state bar association to attend the meeting and assist in urging upon the legislature the necessity for immediate legislation for the relief of the supreme court.

RALPH STONE,
Secretary.

GRAND RAPIDS, Mich.

BOOK REVIEWS.

THE STUDENT'S QUIZ BOOK.—By C. C. Walsh, of the Senior Law class of the University of Michigan. Chicago: Callaghan & Company.

A criticism of this work appeared in a previous issue of this journal. It is now ready. The work covers Anson on Contracts, and also Blackstone as studied at the University of Michigan. In the portion devoted to Anson, the leading cases are annotated, the facts of which are briefly summarized and both the English and American rules clearly stated. By such a method the student gets at once at the gist of the cases, and is led to comprehend and appreciate the perfect system which permeates the whole of Blackstone's wonderful commentaries. This quiz book will, in a sense, take the place of a quiz-master, and will materially assist the student to grasp the abstract principles of law, and save for him a vast deal of time and labor. It is highly recommended by every member of the faculty of the law department of the U. of M., and has already met with a flattering reception and surprising sales.

NON-RESIDENTS AND FOREIGN CORPORATIONS.—Conrad Reno, Chicago: T. H. Flood & Co.

Whatever may be the tendency to needlessly multiply the number of text-books, it can with truth be said that there is little danger of traveling over beaten paths in a work on non-residents and foreign corporations. The law as to non-residents is not thoroughly understood by the profession generally, simply because it is a comparatively modern branch of the law. The business of corporations in foreign states, as Mr. Reno points out in his preface, is increasing because of the vastly improved facilities of communication and transportation which the modern railway, telegraph and telephone systems afford. The law is in its formative state, practically, and Mr. Reno's treatise is of especial value as pointing out in what direction it is tending. Its principal service to practitioners is, of course, that it is a complete and almost unique collection of the law of non-residents and foreign corporations, as it now is, in such shape that it may be used as a book of reference as well as a book of instruction. The term "non-resident" as used in this work means a citizen of the United States who does not reside in the state in which the question arises for decision, or in which the act complained of or relied upon was performed. It does not mean an alien, or a citizen of a foreign country. The term "foreign corporation" means a corporation organized under the laws of a state or country other than the one in which the matter involved arises for settlement, or in which the act complained of or relied upon was performed.

There is one especially commendable feature of Mr. Reno's book. It is admirably indexed, and the table of contents is especially well arranged. Too little attention is paid by modern publishers to the indexing, whereas it is really, to the attorney who uses the book, the most valuable part of it. As Justice Sharswood said, the most important thing is not so much to know the law, as to know where to find it.

U. S. CIRCUIT COURT OF APPEALS REPORTS, VOL. I.—St. Paul: West Publishing Co.

Although every lawyer probably knows something of the new U. S. Circuit Courts of Appeals, yet there are probably some, even among the best read men in the profession, who are not fully informed as to the act establishing the court, and the rules of practice therein. This volume contains the act in full, and elaborately annotated. It also contains the court rules adopted in the different circuits, the rules in admiralty, and a list of the judges of each circuit. These are but minor features of the volume, however. More than 200 cases are reported in full, and all of them are cases of more than ordinary importance. The special value of the decisions is self-evident, when the high character of the tribunals from which they emanate is considered. The typographical style is similar to that of the Federal Reporter. The editorial work has evidently been done with special care. The syllabuses are short and so constructed as to be intelligible without reading the whole decision. The index is quite well constructed, and a table of the cases reported is given, both in alphabetical order, and also arranged under their respective circuits. Abstracts of the arguments of counsel, and extracts from their briefs are given in many instances. Important cases have been annotated, and an index to these notes is given in the table of contents. A careful examination will convince one of the merits of these reports. The printing of the "C. C. A." reports is one of the greatest and most praise-worthy of all the West Publishing Company's great undertakings.

PUBLIC HEALTH AND SAFETY.—By Leroy Parker, Vice-Dean of the Buffalo Law School, formerly President of the Michigan State Board of Health, and Robert H. Werthington, of the New York bar. Albany: Matthew Bender.

This book will certainly occupy a novel place in legal literature, for no work treating solely of the law of public health and safety has ever been published in this country. A careful perusal of the book will convince one of the necessity for such a work, however, and cause one to wonder that a similar work has not before been published. What the book contains can best be seen from the following headings to the chapters:

Chapters I and II—Police Power of the State.

Chapters III and IV—Municipal Corporations; Powers and Duties; Ordinances.

Chapters V to VII—Boards of Health; Organization, Powers and Duties; Responsibility for Their Acts.

Chapters VIII to XII—Nuisances; Legalized and Statutory Nuisances; Responsibility for Nuisances; Remedies for Nuisances; Indictment and Civil Suit; Summary Abatement.

Chapters XIII to XVI—Regulation of Business Pursuits and Professions; Practice of Medicine; Slaughter-houses; Oleomargarine Laws.

Chapters XVII to XIX—Regulations to Secure Purity of Foods and Drinks; Regulation of Markets; Regulations to Prevent Fires.

Chapters XX and XXI—Building Laws; Uses of Buildings.

Chapter XXII—Regulation of Burial.

Chapter XXIII—Regulation of Railroads.

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EARL OF SHAFTESBURY, AUTHOR OF THE WRIT OF HABEAS CORPUS.

HON. ALEXANDER MARTIN.

It is natural that the student of history should desire to familiarize himself with the leading incidents and distinguishing features in the lives and characters of men who have been active in, or prominently connected with great historical events. I am sensible of the difficulty of presenting in the limited space of a monthly serial, a very full or satisfactory sketch of the famous first earl of Shaftesbury, who was one of the most extraordinary actors in the most memorable epoch of English history. So much has been written about him in prose and song, that I shall have to content myself with noticing only the most important events of his life, which tend to illustrate his genius, character and motives. In his life the politician will discover the first and highest type of the modern agitator and demagogue. In the disasters and disgraces which finally overtook him will be found healthful lessons for serious consideration and reflection. The establishment of the writ of *habeas corpus*—that bulwark of English liberty—has been justly attributed to him by both friends and foes. From this circumstance alone the reader would naturally expect to find in his character and life some evidence of moral greatness and disinterested endeavor. Imagine his disappointment when he finds historians like Hume and Macaulay picturing the object of his generous solicitude as the most brilliant, bold and bad man of his time.

Anthony Ashley Cooper—Baron Ashley—Earl of Shaftesbury—was born at Wimborne in St. Giles, July 22, 1621. He was the son of a baronet who died in 1631. While still a school boy he became possessed of a landed estate with an income of nearly \$40,000 a year. He attended at Oxford for a year, but sought and achieved no distinction as a scholar. At the age of 18 he married the daughter of Lord Coventry, keeper of the great seal, in whose society and in whose estates, he seems to have imbibed the little law which he could lay claim to in after years.

In those days it was not difficult for a young man of fortune to make

his entry into public life. In a smart speech at a dinner given by the bailiffs of Tewksbury, he achieved some public notice, which recommended him to the electors of that place, who returned him in 1640 to represent them in parliament. Before the parliament met his distinguished father-in-law died. The parliament lasted only three weeks, and he does not seem to have found any occasion to distinguish himself for those qualities of oratory and debate in which he became so eminent in after years.

The next parliament, known in history as the "Long Parliament," met in November, 1640, to which he was returned by Downton, in Wiltshire county. His election was contested, and he was not able to take his seat as a member of this renowned parliament, until it was recalled by the army, and was popularly termed the "Rump," just before the restoration of Charles II.

Out of parliament, he was at first recognized as a zealous supporter of the royal cause; and was present at the raising of the king's standard at Nottingham, August 25, 1642. In the subsequent year he actively espoused the cause of Charles, and raised at his own expense a regiment of foot and troop of horse, which he took command of in person. He was next appointed governor of Weymouth, sheriff of Dorsetshire, and president of the king's council of war in the county. His conference with the inhabitants of Weymouth was conducted with so much address, that they expelled the parliamentary garrison in charge of the place, and received him as governor. In the craft and persuasion of diplomacy he had few equals. He was ungenerously superseded by Prince Maurice, nephew of the king. Displeased with this treatment, the cause of which has never been explained, he resigned his governorship and commission, and in January, 1664, went over to the parliament, traveling from Oxford to London in the night. When he appeared before a committee of the two houses to explain his conduct, he declared that he had come over because he foresaw danger in the king's service to the Protestant religion. He refused to divulge the secrets acquired during his service to the king. He was received on his own terms.

In August, 1664, he received a commission as field marshal general, and immediately entered upon active military service in behalf of the parliament, assisting in the assault on the royal garrison at Wareham, and in laying siege to Corfe Castle. In October, 1664, he was made commander-in-chief in Dorsetshire county, after which he took by storm Abbotsbury on the sea coast. In December, 1664, he relieved Taunton of a siege of the royalists, while it was being defended by Blake, who afterwards became famous as an admiral. Of his part in this exploit he gave a glowing account, taking great credit to himself. After this affair he never again appeared in the conduct of military operations. I have alluded to them because his promptness and gallantry shown in them indicate that he was not wanting in the qualifications of a successful commander. His

retirement was probably due to the fact that the self-denying ordinance of 1645 put an end to the military supremacy of the presbyterian faction, to which he belonged, and gave the virtual control of the army to the independents, which was organized on a new model to suit Cromwell. For seven or eight years he remained in privacy, contemplating with envy the rising star of Oliver, and endeavoring to get into parliament from various happening vacancies.

To get into power Sir Anthony found it necessary to court the faction of the independents, which he did with so much success that he was appointed high sheriff of Wiltshire in 1647, an office which he is said to have administered with great vigor and success. He was afterwards appointed on a commission of law reform, but found it a dull occupation, for one of his ambition, in such turbulent times.

After expulsion of the "Long Parliament," he commenced to cultivate Cromwell, who seemed anxious to conciliate his favor, and to that end held out prospects of making him lord keeper of the great seal. Being pardoned of his delinquencies, and made eligible to a seat in parliament, he was entered from Wiltshire as a member of the Barebones' Parliament, in which he supported Cromwell's views as against the extreme independents, who were in favor of a republic out and out. He was, after termination of the Barebones' Parliament, appointed on a council of state to conduct the affairs of the country till the assembling of a new parliament. These honors conferred on him by Cromwell raised in him the ambition to marry one of Cromwell's daughters,—the "handsome" and "glib-tongued" Mary,"—his wife being dead. His suit ended in a positive refusal. His dissolute character in all probability rendered him an unfit candidate for matrimony in such a well ordered family.

In the first parliament which met under the "Instrument of Government," by which Cromwell was to be Protector, Sir Anthony sat for Wiltshire, and was returned also for Poole and Tewksbury. Upon his entry into parliament a great estrangement took place between himself and Cromwell, probably on account of not having realized his aspirations for the great seal, which Cromwell sagaciously withheld, out of a well founded distrust in his sincerity as a supporter of his cause. He left the privy council, alleging as an excuse that "the government by one person was against his conscience." Sir Anthony's conscience never was anything but an excuse or hollow pretence. He went in with the presbyterians and republicans who were in opposition to Cromwell, and conducted their proceedings with so much success that a dissolution of parliament took place in five months.

He was elected to the third parliament of the Protector from Wiltshire, but was excluded by the council of state on account of some delinquency. The fact was that his course in the previous parliament had

demonstrated him to be too dangerous and powerful an agitator to suit Cromwell and his friends.

During the Protector's life he intrigued industriously and secretly against him, continuing to profess republican principles.

In the parliament of Richard Cromwell he took his seat from Wiltshire, and accepted the oath of loyalty to the new Protector and abjured the Stuart family. Sir Anthony's divination of coming events was the marvel of his age. He was not long in perceiving that Richard's government would end in a restoration of the monarchy. He thereafter opposed it vigorously, and made such humorous and effective speeches against Cromwell's house of lords, that he hastened the dissolution of parliament. He advocated a recall of the "Long Parliament," which was restored by the army, and passes in history as the "Rump." Upon its assembling he took his seat in it on the strength of his disputed election in 1640, eighteen years before. A majority of this parliament was in favor of a republic, without any official head. While communing with the republicans he was intriguing with the royalists, and doing all he could to shape events for the restoration of Charles II. He corresponded with Monk, who was at the head of the army in the north, advising him to hasten his steps to the capital. He so managed the populace of London that Monk's arrival was greeted with bonfires and rejoicings. He boldly advised him to declare for a free parliament, which was tantamount to a recall of Charles. He advocated a termination of the "Long Parliament," of which he was a sitting member, and was appointed one of the new council of state to carry on the government until the convention parliament should assemble. To this new parliament he was returned from Wiltshire at the head of the poll. It has been said that he was in favor of the restoration upon conditions, but it was useless to urge them, since the royal cause had become so strong, that Monk had no difficulty in carrying it through without conditions. He was one of the twelve commissioners who were sent to Holland to request Charles to return. The king received him, and graciously acknowledged his valuable services in behalf of his restoration.

After the king's return he was loaded with honors and titles such as he had never been able to receive from any of the governments he had previously served; being made successively privy councillor, chancellor of the exchequer, lord lieutenant of the county of Dorsetshire, governor of the Isle of Wight, and Baron Ashley of Wimborn St. Giles. It could not have occurred to Charles in the midst of the rejoicings, that this brilliant and effective convert to his cause, whom he was covering with honors, would bring "woes unnumbered" to his administration; and finally conspire to drive him from his throne, and place his crown on the head of his own illegitimate offspring.

It does not appear that he took any prominent part in parliament for

six or seven years. During this time he sat—to his ineffable disgrace—as member of the commission created to try the regicides. In the discharge of his office as commissioner he exhibits himself in the revolting role of sentencing prisoners with whom he had co-operated in levying war against two of his sovereigns. After these trials he sank for a time from public notice, attending to the duties of his office as chancellor of the exchequer; paying homage to the king and his reigning mistresses, and achieving a high reputation for licentiousness in a court filled with dissolute adventurers from every court in Europe.

To the restless genius of Shaftesbury, no condition of life either good or bad could continue long. Perceiving a dislike rising between the king and Clarendon, his prime minister, he set himself to the task of widening the breach, and soon had the satisfaction of seeing him banished from the realm. There now remained nothing between him and the great seal, except the declining age and increasing infirmities of Sir Orlando Bridgeman, to whom it had been committed as lord keeper. To hasten the prize of his ambition, he recommended himself to his sovereign by secretly suggesting to Clifford, lord treasurer, the most unprincipled measure which could have been adopted to furnish his master with funds, and thus enable him to rule without the assistance of parliaments. It consisted in stopping payments in the exchequer. It had been the practice of the king to anticipate the incoming revenues, by loans from the bankers of London, which loans, with profitable interest, were paid out of the revenues when received. By stopping these payments great hardship was visited on the bankers, who were without means to meet their engagements, and who were sued by their creditors. Perhaps nothing during the whole reign produced so much distrust of the king and his administration. It has been said by some that Shaftesbury was not responsible for the measure, but that Clifford advised it in the council. The evidence is very strong in attributing the suggestion of the measure to the fertile brain of Shaftesbury, who was capable at any time of secretly advising and ostensibly opposing any measure adopted by the council. It was as a reward for this bold and original measure that he was ennobled with title of Earl of Shaftesbury, by which he is known in history. He became now the active head of the administration, and in order to retain his popularity with the public, recommended that the suits against the bankers who could not fulfil their obligations on account of the treasury stop be enjoined in chancery. The refusal of Lord Keeper Bridgeman to issue the injunctions, led to his dismissal, an event which was pleasing to Shaftesbury. Thereupon the great seal was delivered to Shaftesbury on the 17th Nov., 1672, in the apartments of Lady Castlemaine, with the title of lord chancellor.

His first official act was to issue writs for the election of thirty-six new members of parliament, to fill vacancies, by which it was intended that only adherents of the royal cause would be returned.

It has been stated by Hume and other historians, that Shaftesbury discharged the legal duties of his office with great ability and success. Lord Campell, in his "Lives of the Lord Chancellors," examines the merits of these statements and reaches the conclusion that they are without foundation. He finds authority for the statements only in a few lines of the famous satire of Dryden's "Absalom and Achitopel." As the story goes, after Dryden had unmercifully lampooned him in the first edition, his son was appointed by the chancellor to a lucrative position; and the father wishing to concede some merit to him, in order to relieve the black picture, introduced a few lines into the second edition, lauding him as an able and upright judge; which was of short duration. According to the most reliable information we have, he started in with the determination to break away from the forms and precedents of chancery, and to administer equity by the light of nature. But his ignorance of the law led him into so many errors and mistakes which he was called upon continually to correct, that he finally gave up, and resigned himself to the disposition of the bar, never appearing on the bench except in association with a common law judge and a master in chancery, who presumably saved him from mistakes and gave respectability to his decrees. It is probable that his change of demeanor on the bench may be attributed to the increased attention required of him in the discharge of the political duties of his office, necessitated by the embarrassments gathering over the monarchy, and which were more congenial to his tastes and temperament. It is reported of him that he was vain; but above bribes.

At the opening of parliament in February, 1673, he was in entire accord with the administration in violating the triple alliance by which England had agreed to maintain the integrity of Protestant Holland, against the designs of the French king, and in advocating a war against it, carefully disguising his motives by appealing to the popular jealousy of the maritime prosperity of Holland, applying to her the famous "*delenda est Carthago*" of the Romans. Among the first things done by the house was that of declaring the elections void which had been held in pursuance of his writs. He was in favor of resisting the action of the commons, but it was so unanimous that the king and council refused to accede to his wishes. It is probable that at this particular juncture, the king began to be impressed with the danger of following his bold and reckless counsel. The confidence of his master was more signally shaken when he learned that his chancellor who had advised him in making the declaration of independence, which practically suspended the penal statutes against ecclesiastical offenses, had, after the house of commons had pronounced against it, receded from his advice, while the king was in favor of resistance. As the chancellor was believed to have recently fomented the action of the house, the king, finding himself cheated by his chancellor, cancelled the declaration.

Now Shaftesbury perceiving the rise of protestant influence set himself at work to expel from the councils of the king all the ministers of Romanist tendencies, and to dictate to the king his own policy, as the leader of the dominating protestant influence. To this end he advocated the passage of the "Test Act" bill, which contained declarations which no catholic could conscientiously take. Upon its passage Clifford, the lord treasurer, resigned, and the Duke of York, although excepted from its effect, surrendered all his offices. The object of the act was to exclude all catholics from all affairs of the state, an unjust and impolitic act, which was not got rid of for 150 years.

Shaftesbury next intrigued with the extreme party in the house, who were pressing a declaration against the contemplated marriage of the Duke of York with a catholic princess, as dangerous to the established religion. Much against his wishes this project was defeated by the king proroguing parliament. Very soon afterwards, on the 16th Sept., 1673, he was dismissed from the chancellorship, having held the great seal a little less than a year.

Upon his retirement from office he was gladly received as leader of the country party in opposition to the Romish tendencies of the court. The religious predilections of this party gave him his power. This power he used to accomplish his own designs, not theirs. His intimate associates have expressed doubts about his belief in revealed religion.

In the opposition thus espoused, in which it would necessarily fall to his lot to oppose such a corrupt administration as that of Charles II, it is not to be expected that his conduct could have been very often otherwise than meritorious. I will notice some of the more important movements made by him, in which it will appear that bad men are not always bad; which may be accepted as kin to the apothegm that "good men are not always good."

He successfully opposed in the house of lords a bill leveled specially against himself, but broad enough in its terms to include hundreds of others, which required from all persons in office and in parliament a declaration of passive obedience, coupled with an oath "never to endeavor the alteration of the government in church or state." The passage of such a bill would have seriously impaired the cause of constitutional liberty. No man subject to it could have advocated any material improvement or reform in the government as established. In his opposition he employed all the arts of obstruction, of which he showed himself at that early day to be a consummate master. The Parnellites in their stubborn resistance to the house of commons were only mild imitators of Shaftesbury, and Senator Johnson in his fight in the United States senate against the force bill only a commendable apprentice of the same incomparable parliamentarian. Shaftesbury carried on a debate of five days before the bill could reach a second reading. He kept it twelve days in the committee of the whole

house, from early morning to 8 and 12 o'clock at night. After it passed the house of lords, of which he was a member, he caused it to be defeated in the house of commons, of which he was not a member, by a signal stroke of tactics, which showed that his craft and resources were next to illimitable. After its passage in the house of lords, it went down to the house of commons, in which it was carried along by bribery to a second reading. At this stage of the proceedings, when everybody accepted its passage as a foregone conclusion, Shaftesbury, who was always popular with the masses, went down among the country members of the house, and stirred up a bitter quarrel between the two houses on a question of privilege, in which it was contended by the lords, that as constituting the highest court of the realm, they had the right to try appeals in questions of this kind, even though the defendant was a member of the house of commons. This sudden controversy foisted between the two houses by Shaftesbury, threatened such serious consequences to the administration, that it was found necessary to prorogue the session of parliament for five months. This ended the bill; as the house when it assembled again was in no better mood than before, but was again prorogued for one year and five months.

When parliament assembled in February, 1677, Shaftesbury made a short-sighted movement, an unusual thing with him, which temporarily interrupted his career as a legislator and sent him as a prisoner to the Tower for over a year, a misfortune to him, but perhaps a fortunate event to posterity, who derived from the inspiration given to him by his imprisonment, the origin and benefits of the famous writ of *habeas corpus*.

He took the position in the house of lords, that parliament could not be prorogued for a longer period than one year, and that as the king could not be presumed to have intended a violation of law, his act of prerogation would have to be construed as a dissolution. It was a bold act for a member of a legislative body, which was also the highest court in the realm, to stand up in its presence, and insist that it was an illegal assembly. Upon his refusal to retract this contention, he was committed to the Tower during the pleasure of the king and the house, * * * for contempt and insult to parliament. This contention was equally distasteful to the house of commons. The other lords, who were committed with him, submitted to a retraction, and were discharged, but Shaftesbury continued in his contumacy, and irritated the lords by suing out a writ of *habeas corpus* before the king's bench to obtain his freedom as against an illegal commitment, or at least for bail with trial for his supposed offense. Upon being brought into court he argued his own case, but the court remanded him on the ground that it had no jurisdiction to interpose in punishments for contempt. Thereupon he languished in the Tower about a year, making many written appeals to the king and others in power to grant his release without success. At last in February, 1678, he petitioned to be brought to the bar of the house to make retraction and apology. He

was released upon formally acknowledging that his action in questioning the legality of parliament was ill-advised, and that his conduct in bringing the writ of *habeas corpus* in the king's bench, was in violation of the privileges of the house, and an aggravation of his former offense. Upon his return to the house he found himself without his former influence and popularity. But a man of his extraordinary and unscrupulous resources could not fail to be a dangerous opponent of the court.

Of every measure thereafter adopted by the opposing faction, he was either an original promoter or vehement advocate. He affected to believe the perjuries of Oates about a Popish plot to overthrow the government; and heartlessly voted for the execution of Stafford as guilty of the pretended conspiracy. He persisted in his advocacy of the bill for removal of the queen from the court of the husband, after it was rejected by the house of lords.

After the new parliament met in March, 1679, the king tried the dangerous experiment of forming a new privy council, in which the leading chiefs of the opposition were invited to sit as members. Shaftesbury accepted this invitation, and was made president with a salary of \$19,440 a year. Shaftesbury quickly perceived that the popular movement against the administration was stronger than the court, and he therefore did not relax his opposition. He opposed the succession of the Duke of York, by bringing into notice the Duke of Monmouth, an illegitimate son of the king, born at Rotterdam during his exile. His position in the council enabled him to encourage the unfounded belief that the king favored him as a successor to the crown.

While pressing on the bill for excluding the Duke of York from the throne, he succeeded in carrying through both houses the act securing and enforcing the writ of *habeas corpus*, which has become a part of the British constitution, and has been incorporated into all the constitutions of the American states. No man but Shaftesbury could have achieved in those turbulent times, such a signal triumph in behalf of personal liberty. According to common law no man could be lawfully imprisoned except upon a warrant setting forth the particular offense of which he was accused; and every man accused was entitled to a speedy trial. But the remedies for enforcing these behests of the law proved defective. Writs for producing prisoners before courts were continually refused; sheriffs and jailors refused or neglected to obey them when issued. To remedy these abuses, which Shaftesbury had been enabled to realize, while languishing in the Tower, he framed a bill with such admirable provisions, that it has ever since constituted our greatest guarantee of personal freedom. He caused it to be introduced into the house of commons, through which it passed without serious opposition. When it came to the house of lords, it encountered the opposition of the court party, although known to be the avowed measure of the lord president of the council. Amend-

ments were made to it with the expectation that if passed they would not be agreed to by the house of commons. It is more than traditionary that the third reading in the house of lords was carried by a mistake in the tally. Bishop Burnet, who is a partial historian of Shaftesbury's life, says: "Lords Grey and Norris were named to be tellers Lord Norris, being a man subject to vapors, was not at all times attentive to what he was doing. So a very fat lord coming in, Lord Grey counted him for ten, as a jest at first; but seeing Lord Norris had not observed it, he went on with his misreckoning of ten; so it was reported to the house, and declared that they who were for the bill were the majority, though it indeed went on the other side." After the majority in its favor had been announced from the chancellor's seat, Shaftesbury, perceiving a commotion among the opponents of it, as from a surprise at the result, immediately took the floor, and spoke on some other matter for nearly an hour, concluding with a motion relating to the matter of which he had been speaking. During his speech many members entered and left the house, so that the division if called for again could not have been taken. A division was taken then as at the present time, by all the voters retiring and coming back through two doors—and not by ayes and nays as in American assemblies. The bill as thus passed by the lords was hurried down to the house of commons, for agreement to the amendments. The conference between the houses was managed with so much address by Shaftesbury, that all objections to the amendments were waived by the commons, and the bill reported back to the lords as perfected. Soon after the king came in, taking his seat on the throne, and the bill being read by its title as having passed both houses, he assented to it, and it became an enduring charter for the relief of prisoners and captives.

A mistake in the division on the third reading is corroborated by the records or minutes of the house. The members declared were 57 for the bill and 55 against it. This would imply a house of 112. But the minutes show that there were only 107 peers attending the house—five, instead of ten, less than the number declared by the tellers. To contrive the mistake or to take advantage of it, was in line with Shaftesbury's parliamentary methods. It is probable that in social conversation with Bishop Burnet or some of his friends, he alluded to the matter as a humorous incident in his experience as a law maker, and it therefore passed into current circulation. Thus it would seem that the Anglican nations of the world are indebted to this great shield of personal liberty, not only to the most unprincipled man of his age, but to the concurring assistance of a mistake, which he skilfully turned to their advantage, or a fraud perpetrated by him in their behalf.

Shortly after the passage of the *habeas corpus* act the parliament was prorogued until Aug. 14, 1679, for the purpose of defeating the exclusion bill, which was violently pressed on by Shaftesbury. This was done with-

out advising with him, although he was president of the council. The king after his prorogation, came to the conclusion that a new parliament could not be more hostile to him, and without consulting Shaftesbury ordered him to prepare a proclamation dissolving it and calling a new one. As the election proceeded for the new parliament it became apparent to the king that it would not be favorable to him, whereupon he surprised his lord president by proroguing it for twelve months without consulting him or the other members of his council. Shaftesbury must have seen that his presence was no longer wanted in the council. But this was a trifling matter to him, if in his opinion he could do more effective work against his king in the council than out of it. Accordingly he stayed until he was dismissed. On his advice the other members in accord with him resigned. The opposition was organized stronger than ever with Shaftesbury as leader; and the long struggle began between the "court and country parties, to whom were now applied for the first time the appellation of tories and whigs. Until the meeting of the parliament last called Shaftesbury was industriously engaged in inflaming the public mind against the king and his brother, endeavoring to have the latter indicted as a popish recusant.

As soon as the new parliament met the bill for the exclusion of James from the succession was introduced and passed the house of commons, but it failed in the house of lords. Shaftesbury led the opposition, while Lord Halifax, his nephew, advocated the royal cause. To keep up the intensity and bitterness of the struggle, he introduced a bill to dissolve the king's marriage, which he allowed to be postponed, being satisfied with the effect of its introduction. Bills and resolutions of the most revolutionary kind followed in quick succession, till the king dissolved the parliament and summoned a new one to meet at Oxford, in order to avoid the influence of the London population, who were obedient to Shaftesbury's will.

In the Oxford parliament the royal cause was no stronger than before. The struggle centered on the exclusion bill, which had been defeated in the previous parliament. The king in opening the parliament signified his willingness to accept any measure or arrangement by which the administration of affairs should be placed under protestant control, in the event of the crown coming to a catholic prince. But in no event was the legal descent of it to be broken. To put an end to the actions of his enemies in this his last parliament, he dissolved it and never called another one. This movement of the king deprived Shaftesbury of his great and most effective instrument of warfare, viz: parliament.

A reaction took place in the public mind, due undoubtedly to the proffered concessions of the king, and the violent and extreme measures of Shaftesbury and his supporters. Shaftesbury was arrested for treason, but was discharged, the evidence produced against him being insufficient.

The king having dispensed with parliament, commened to take advantage of the reaction in his favor to establish despotic rule. Shaftesbury, knowing that there was no hope in the future administration of James, finally determined on the desperate resort of insurrection to carry into effect the purpose of the exclusion bill and the project of elevating Monmouth to the throne. He settled his estates for the use of his family, and then set on foot secret preparations for a general rising of his followers and adherents in London. When the rising did not take place as he had expected, he disguised himself as a presbyterian minister and seeking his way to the coast he embarked, after a delay of ten days, in an open boat. After a tempestuous voyage he landed in Amsterdam. The good-natured Hollanders received him, only humorously alluding to his hostile speech, when he incited war against them: "*Carthago non adhuc deleta, Comitem de Shaftesbury, in gremio suo recipere vult.*"

A short time after his arrival he died from an attack of gout, in January, 1683, in the sixty-second year of his age.

His last effort to make headway against his king has been condemned by most of his biographers as reckless and imprudent. Indeed it is impossible for us to know how near he came to success. He saw clearer into the future than any other man of his day. Only a few years after his death, the principles of his exclusion bill, and the motives of his insurrection culminated in the second revolution, which drove James II from the throne, and limited the descent of the crown to protestant blood.

Columbia, Missouri.

MICHIGAN STATE BAR ASSOCIATION.

The meeting of the Michigan State Bar Association, adjourned from July 26, 1892, convened at Lansing, at 2:30 o'clock in the afternoon of January 17, in the supreme court room, for the purpose of hearing the report of the committee on jurisprudence and law reform, which was instructed at the annual meeting "to prepare a report as to the best means of relieving the supreme court," and to take action upon that report. There was a very large attendance of the members of the association and of the lawyers of the state. Edward Cahill, president of the association, called the meeting to order, and Ralph Stone acted as secretary. President Cahill addressed the association as follows:

It is no ordinary occasion that has called us together. The condition of business in the supreme court has come to be such that some measure of relief is everywhere recognized to be necessary to the due administration of justice. For years the present court has been struggling to keep abreast with the growth of business. When the court was organized twenty-five years ago, four judges were thought necessary to do the business of the state, containing 600,000 people. To-day we have nearly four times as great a population. We had at that time, including the district of the Upper Peninsula, eleven circuits, each with one judge. The wealth and business of the state has more than kept pace with its growth and population. The change in the modes of travel and transportation, the use of machinery in all kinds of manufactures, have tended to increase the hazards of business and multiply litigation.

At the July meeting of this association I submitted some figures showing the growth of business in the supreme court from 1860 to 1891. As there are many present to-day who were not in attendance at that meeting, and who may not have seen those figures nor investigated the subject for themselves, I take the liberty to call your attention to them now.

The population of this state in 1861 was, in round numbers, 750,000. The number of cases decided by the supreme court in that year was, at the January term, 6; April term, 12; July term, 7; October term, 19; total, 44. The population in 1871 was, in round numbers, 1,200,000, and the number of cases decided in the supreme court was, at the January term, 28; at the April term, 27; July term, 23; October term, 19; total, 97. The population in 1881 was, in round numbers, 1,700,000, and the number of cases decided in the supreme court, at the January term, was 106; April term, 71; June term, 93; October term, 107; total, 377. The population

in 1891 was, in round numbers, 2,200,000, and the number of cases brought to the supreme court that year, including motions, was 829. The number of cases decided by the court was, at the January term, 114; April term, 125; June term, 107; October term, 123. In addition to this there were 28 opinions in motions; total, 497. A comparison of these figures, relating to the population, will show that the state increased in population about one-half a million in each decade. A like comparison of the business of the court will show that it has increased in a much greater ratio. The increase in population from 1861 to 1871 was 66½ per cent.; the increase in business in the court was 97 per cent. From 1871 to 1881 the increase of population was 41 per cent.; the increase of business in the court was 185 per cent. From 1881 to 1891 the increase of population was 77 per cent.; the increase of business in the court was 120 per cent.

An examination of these figures and of the situation generally leaves only one question open for discussion, and that is, what shall be done? I have received a number of letters from members of the bar of the state who had intended to be present, but who have been prevented by professional engagements. These letters, without exception, recognize the gravity of the situation, and in most cases, suggest the writer's views of some measure of relief. Many of them contain valuable suggestions as to some measure of relief. The letters are here and I consider them subject to the order of the association. Before proceeding to the regular order of business it may be proper for me to state that this meeting has been called for a particular purpose. I have discovered in some of the letters I have received a disposition to discuss law and judicial reforms generally. No doubt there are enough of them that need discussion and remedy; but this meeting was called to determine some measure of relief for the supreme court in the interest not merely of the court itself, but of the whole people of the state, whose rights of person and property are in its keeping.

It is to be expected that there will be some, perhaps considerable diversity of opinion as to the best plan to be adopted. The subject must be approached, not only from the standpoint of what is best, but what is feasible. It is highly necessary that we should agree upon something definite if we expect the legislature or the people to give relief. It would be hardly fair to ask them to agree upon a measure after the bar of the state assembled for that special purpose, had failed. The two things to be kept in mind are: 1st, How shall the court be able to keep up with the business? and 2nd, How shall all the justices be able to give to the cases in which they sit the careful study and consideration that is given by the justice who writes the opinion, and, at the same time, give to litigants the benefit of an intelligent agreement of a majority of the justices upon the principles decided? This is the problem, and to its solution I hope we may direct our successful efforts to-day.

At the conclusion of his remarks the president called upon the committee on jurisprudence and law reform for its report. In the absence of the chairman, George W. McBride, of Grand Haven, presented the report, which was as follows:

To the Michigan State Bar Association:—At the annual meeting of your association the following resolution was adopted:

“That the committee on judicial reform prepare a report as to the best means of relieving the supreme court, and that they present it to the governor at the next meeting of the legislature, and to the legislature also.”

Subsequently the meeting was adjourned to January 17, 1893, and the committee has thought it more in accord with the whole situation to present the report to this meeting, so that action thereon may be taken and the suggestions in the report be presented to the legislature, or such other course be taken as the meeting thinks best.

Your committee, however, brought to the attention of outgoing and incoming governors the matter of recommending some plan of reform of the judiciary, and in one of the messages such recommendation was made. It might be proper for this meeting and the legislature to consider whether the time has arrived for any measure of relief at all. At the annual meeting it was assumed that further delay would place the business before the court so far in arrears that it would be a hardship and grievance to suitors, and a condition which in other states has been found deplorable. It has been learned, however, on inquiry that the court is but little behind the current business, and unless the percentage of cases coming before it shall increase, it may be that the court can keep fairly well abreast of matters presented for its decision. Sooner or later, however, it is likely that something must be done, and with that in view your committee has discussed two plans.

One of these is to amend the statute creating the supreme court by providing for two or more additional judges. The other plan is to leave the supreme court as it now is, and submit to the people at the next spring election an amendment to article six of the constitution of this state, whereby the legislature should be given authority to provide for one or more intermediate or appellate courts, as the demands of business might from time to time require. Your committee, after some discussion has decided to recommend to the meeting the latter of the two plans.

The precise jurisdiction that the appellate court should have, should be thoroughly discussed in order that an intelligent conclusion may be reached, but in a general way your committee believes that in all matters not involving personal liberty or the constitution of the state, the matter in dispute being less than \$800, it should have exclusive jurisdiction. There might also be excepted from its jurisdiction cases for divorce.

There might also be left to the appellate court power to certify on application any case which to the court might seem of sufficient importance, and about which there was sufficient doubt, to justify a further consideration by the court of last resort.

This plan would free the supreme court of a large amount of business which now encumbers its docket but in which the amount in controversy is too inconsiderable to justify the time and expense attending a final hearing. Your committee finds especially good reason for recommending the plan under consideration in this—that business in the proposed court could be promptly disposed of and with no greater cost to litigants than the amount in controversy would justify. To this end it is suggested that the court might hold possibly six terms a year, and that it should not be incumbent upon parties to print the records or briefs.

The committee recommends that the appellate court be composed of three judges whose salaries should be not less than \$4,000 per year, and that if at the outset but one court was thought necessary it should hold its sessions at the capitol. If in the future additional courts of a like kind should be called for, the legislature would have power to provide for their sitting at some of the principal centers of the state.

Your committee also take the liberty of recommending that the judges of the supreme court and also of the appellate courts—in case they shall be established—shall be paid by the state their actual expenses while away from home in attendance upon their official duties.

Your committee consider it best that members of the courts should not be required to change their places of residence while in office. There are many reasons why it will be more satisfactory to the people to have the residences of the judges distributed about the state, and yet these officials while put to expense in the performance of their duties, ought not to be called upon to defray from their salaries their personal expenses. The amount in the aggregate would not be large, but it would be an act of simple justice which should have long since been provided for.

T. J. O'BRIEN,

A. J. MILLS,

JOHN C. PATTERSON,

GEO. W. McBRIDE.

James H. Campbell, of Grand Rapids, reported that Governor Rich had been seen and that he had expressed himself as being in sympathy with some plan for the relief of the court. The report of the committee was thoroughly discussed by the following attorneys: C. A. Kent, E. W. Pendleton, Hoyt Post, J. J. Speed, and E. F. Conely, Detroit; J. C. Knowlton, B. M. Thompson, Charles R. Whitman, and A. J. Sawyer, Ann Arbor; A. B. Morse and J. H. Campbell, Grand Rapids; J. C. Patterson, Marshall; T. F. Shepard, Bay City; Benton Hanchett, Saginaw; R. A.

Montgomery, Lansing; A. A. Ellis, Ionia; T. E. Barkworth, Jackson; J. B. Moore, Lapeer; and Fred H. Aldrich, Cadillac. (See editorial for report of this discussion.)

The following resolution, introduced by Hoyt Post, of Detroit, and twice amended on motions of E. F. Conely of Detroit and T. E. Barkworth of Jackson, was adopted:

Resolved, That it is the sense of this meeting that the best method of relieving the pressure of business in the supreme court is to increase the number of judges by five.

It was moved and carried that a committee of three, of which the president of the association shall be chairman, be appointed, and authorized to prepare a bill in accordance with the resolution adopted, and present it to both houses of the legislature. The following committee was appointed: Edward Cahill, Lansing, chairman; George P. Wanty, Grand Rapids; and Levi L. Barbour, Detroit.

The association then adjourned.

BILL TO RELIEVE THE SUPREME COURT.

The committee appointed by the Michigan State Bar Association to prepare a bill, to present to the legislature, providing for an increase in the number of judges of the supreme court so as to enable the court to keep up with the business, decided that each member of the committee should prepare a bill, and that a satisfactory measure should be framed from the three. Edward Cahill of Lansing and George P. Wanty of Grand Rapids have drafted bills which are identical in nearly every respect, differing only as to minor details. Levi L. Barbour of Detroit has not prepared a measure as yet. Judge Cahill's measure differs from Mr. Wanty's in that it provides that the new justices shall take office May 1, 1893, instead of January 1, 1894. His bill also provides that three justices shall constitute a quorum and that the concurrence of three shall be necessary to a final decision. Neither bill undertakes to provide for the details of reorganizing the court into divisions, but that is left to the court itself. Mr. Wanty's bill is as follows:

A BILL to amend sections one, two, three and thirteen of an act entitled "An act to provide for the organization of the supreme court, pursuant to section two of article six of the constitution; as amended, so as to provide for the election of five additional justices of the supreme court, and for the division of the supreme court into two sections, being sections six thousand three hundred and eighty-two, six thousand three hundred and eighty-four, and six thousand three hundred and ninety-two of Howell's Annotated Statutes.

Section 1. *The People of the State of Michigan enact*, That sections one, two, three, and thirteen of an act entitled "An act to provide for the organization of the supreme court, pursuant to section two, article six of the constitution," approved February sixteen, eighteen hundred and fifty-seven, as amended, be, and the same are hereby amended so as to read as follows:

(Sec. 6382) Section 1. That from and after the first day of January, eighteen hundred and ninety-four, the supreme court shall consist of a chief justice and nine associate justices to be chosen by the electors of this state, and in the meantime the court shall continue as at present organized.

(Sec, 6383) Section 2. A general election shall be held in the several townships and wards of the state on the first Monday of April, in the year one thousand eight hundred and fifty-seven, and on the first Monday of

April in every year thereafter for the election of justices of the supreme court.

(Sec. 6384) Section 3. At the election to be held in the several townships and cities of this state on the first Monday of April, one thousand eight hundred and ninety-three, there shall be elected six associate justices of the supreme court who shall enter upon office on the first day of January, one thousand eight hundred and ninety-four, one of whom shall hold his office for one year, one of whom shall hold his office for three years, one of whom shall hold his office for five years, one of whom shall hold his office for seven years, one of whom shall hold his office for nine years, and one of whom shall hold his office for ten years from the first day of January, one thousand eight hundred and ninety-four. The ballots cast for such justices shall designate the length of the term of service of each justice voted for. And after said election, one associate justice of the supreme court shall be elected every year and their term of office shall be ten years; the place of each justice shall be filled by an election to be held on the first Monday in April preceding the expiration of his term of service, and the present justices shall hold office until the expiration of the terms for which they were elected.

(Sec. 6392) Section 13. The supreme court, as organized under the provisions of this act, may by rule be divided into two sections for the transaction of business, and shall have the same jurisdiction and powers which have been conferred by the constitution and laws now in force upon the present supreme court. Four terms of the supreme court shall be held annually, commencing Tuesday after the first Monday of January, April, June, and October, which shall be called respectively the January, April, June, and October terms of said court. All the terms of said court shall be held at the supreme court rooms in the city of Lansing, in the county of Ingham. The court may hold special or adjourned terms and shall continue in session a sufficient number of days at each term to hear all the cases ready for hearing, and all causes and questions not decided at the term when the same are submitted, shall be determined early in the next succeeding term.

This act is ordered to take immediate effect.

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THE *Law Journal* (London) began its twenty-eighth volume January 1, and appeared on that date in a new dress and enlarged form. "The consistent and increasing support of the legal profession," it says, "has made this alteration not only possible but necessary." The *Law Journal* is one of the most valued of our exchanges. May the next twenty-seven years of its existence be even more prosperous.

IN REPLY to our expression of opinion that a university must have a law department connected with it in order to make it such in the true sense of the word the *Chicago Legal News* asks where we class the Chicago University, which has no law school connected with it. We have already assumed that the Chicago University intended to justify its use of that name by adding a law department as soon as practicable. This we understand will soon be accomplished. Certainly it could not have had any other end in view when it assumed that name.

OUR leading article in this number is an exceedingly scholarly production from the pen of the Hon. Alexander Martin, dean of the law department of the University of Missouri, which is located at Columbia, Missouri. Mr. Martin is one of the most distinguished of the early graduates of the University of Michigan. He received the degree of A. B. in 1855, A. M. in 1858, and received his legal education at Harvard, graduating from the law school there with the class of 1858. He was once judge of the supreme court commission of Missouri.

THE latest arrival in the field of college legal journalism is the *Northwestern Law Review*, which is published during the collegiate year by the students of the Northwestern University law school, one of the smaller law schools, located in Chicago. The first issue is January, 1893,

and in general "make-up" much resembles the *Yale Law Review*. It contains an article by Hon. Seymour D. Thompson, of St. Louis, upon "Lost or Stolen Share Certificates," and one by Professor Nathan Abbott, of the Northwestern school, and formerly connected with the law department of the University of Michigan, upon "Testamentary Capacity as Affected by Contract." This belongs to the special subject in which Prof. Abbott gave instruction at Ann Arbor. We trust that the new review may meet with favor among the students of the school.

WE call the attention of the attorneys of the state to the new department which we have added to the *LAW JOURNAL*, in response to a general request for it. It is a complete monthly record of the cases decided by the supreme court, comprising an index to the subject matter of each opinion, the name of the case, how brought before the court and from what part of the state, the name of the judge who has prepared the opinion, and the judgment of the court, whether affirmed, reversed, etc. Nothing like it is published anywhere, and its utility to lawyers in the preparation of cases, as a reference for the latest decisions of our supreme court, is apparent. It is the purpose of the editors of this *JOURNAL* to supply the needs of the attorneys of the state as far as they are perceived, and we are satisfied that this record will be appreciated.

In a post prandial talk at the Sanborn banquet, held in St. Paul some time since, Henry C. Caldwell, United States circuit judge for the eighth district, severely criticised the necessity as well as the efficiency of the United States circuit court of appeals. In a letter from Judge Caldwell, dated Jan. 9, he says: "You will observe that I intimate in my talk, on that occasion that there would have been no necessity for the creation of the circuit court of appeals, if the jurisdiction of the federal courts had been restricted within the proper limits. This expression was made upon full deliberation and upon a profound conviction of its truth. There is no greater source of individual hardship and oppression in this country, than that resulting from the exercise of jurisdiction by the federal courts under the existing judiciary acts, in cases to which their jurisdiction should never have been extended. If I have leisure, I will take occasion to say something for publication in the *LAW JOURNAL*, on the subject of original jurisdiction of the federal courts, in which I shall try to point out the defects of the present law regulating that jurisdiction."

A CORRESPONDENT makes a suggestion which is not without merit. He puts the query: "Should anyone be permitted to draft deeds of conveyance of real estate without being licensed to do so?" He thinks that no one should and adds that "every man so licensed should be responsible to the injured party for all damage sustained because of mistakes made by him in drafting such conveyance. Lawyers, by virtue of their qualifications as attorneys, should be permitted to draw up conveyances, but no other person should be allowed to do so except licensed scriveners, and the fee for such license should be regulated by law." Our correspondent thinks that before the license is issued, the applicant should pass an examination before the circuit judge of the county in which he resides, and his license should be issued for a term of years, fixed by statute. A great deal might be said about the loose manner in which conveyances are drafted by incom-

petent real estate men. There is no doubt that any plan which has in view the improvement of the professions or occupations related to the law, will receive the endorsement of lawyers. It is evident, however, that if deeds are so drawn that no flaws in them can be discovered, litigation over disputed titles and imperfect conveyances will be reduced.

THE Cornell University law school faculty shows commendable enterprise in establishing a summer law school, in response to a growing demand for summer instruction in the law. The school will open next summer, and instruction will be given by the entire resident faculty. Cornell is quite able to do this because its school, at present, is young and the attendance not large. The members of the faculty, therefore, are not overworked, and can easily deliver summer lectures in addition to the work of the collegiate year. A summer course at the University of Michigan law department, on the other hand, would be somewhat impracticable because the capacity of the resident faculty is already taxed to the utmost. Our school of law is by far the largest in the country, and the most popular. It is becoming unwieldy, in fact, because of the large number of students, and in spite of the enlarged accommodations afforded by the new building. A summer law school is not a novelty, as there has long existed one at the University of Virginia. Such a school is valuable to the law student for review work, and to the student who is preparing for his admission to the bar at the fall term of court. A summer course would undoubtedly be taken advantage of by business men, desirous of becoming familiar with commercial law.

SINGULARLY enough, just as in the case of the meeting of the Michigan State Bar Association, the annual meeting of the New York State Bar Association, convened at Albany on the same day, was the largest, and most enthusiastic and successful meeting in the history of the association. To pursue the parallel further, the New York association had under consideration, among other things, practically the same question that was discussed at Lansing. Judge Danforth read a paper stating with great vehemence his opposition to increasing the number of judges in the court of last resort in New York state, and expressed preference for limiting appeals. The present court consists of seven judges, and Judge Danforth seemed to consider that number sacred and not to be disturbed. Mr. F. R. Couderd, one of the most eminent lawyers of the New York city bar, expressively stated the disfavor with which the lawyers received the recommendation of the commission in favor of limitation of appeals, by quoting Charles Lamb's language on the damning of his farce: "Good Lord! How they hissed!" The suggestion was made that the court be increased to fifteen with seven sitting all the time, very much the same plan approved almost unanimously by the Michigan State Bar Association. We will examine with interest the full report of the proceedings of the New York State Bar Association when it is issued.

JUDGING from a bill recently introduced in the senate of New York state providing for the creation of attorneys, it would seem that Kansas soil is not the only soil fruitful in legislative freaks. This bill, which we are assured was seriously framed and introduced, provides that "any person who has qualified and served as a member of the legislature of the

state for at least seven years, shall be, on motion to the general term, admitted and licensed to practice as an attorney and counsellor in the courts of record of the state, without examination and without complying with any other requirement." Such nonsense is the legitimate result of the dominance of Tammany Hall in New York politics. Consider, if you can, how greatly the tone of the bar of New York city would be improved by the admission to its ranks of a lot of Tammany saloon-keepers and bosses, who have been sent to the legislature for seven years or more, as a reward for their political services. The doctrine that men can be turned out of the legislature after a few years of experience there, and stamped "lawyers" is as ridiculous as the theory of "fiat money." If doctors were "coined" with as much freedom, how long would it be before the profession would fall into distrust and disrepute? It is hardly possible that this bill will pass the New York legislature and become a law. It serves, however, to illustrate the importance of making a careful selection of our legislators, and it shakes our faith in the "party system" which permits of the nomination of such "freaks" as this New York legislative solon.

ADMIRERS of the refreshing literary style of Irving Browne Esq., editor of the *Albany Law Journal* will be pleased to learn that he has been selected by the editor of *Green Bag* to conduct a department in that popular attorney's magazine, entitled "The Lawyer's Easy Chair." Knowing what we do about the delightful "gems in prose" that have come from Mr. Browne's pen, we feel like congratulating Mr. Fuller upon his happy choice, and the readers of *Green Bag* upon such a decidedly entertaining acquisition to the magazine as this new department undoubtedly will be under Mr. Browne's management. "The Lawyer's Easy Chair" first appears in the January number, and when we saw that Mr. Browne's name was at the head of it, we immediately settled back into our own editorial easy chair for a half hour's pleasant mental recreation. The gifted editor of the *Albany Law Journal*, besides editing a first-class legal periodical, conducting a department in our only magazine of light legal literature, telling jokes about the profession, and satisfying the thirst for legal lore of the students of two law schools, has found time to write a law-book upon a very technical subject. Within a few days we may expect to see "Browne on Parol Evidence," which we understand is about to issue from the press. The author says his purpose has been "to treat of the admissibility rather than the non-admissibility of parol evidence." In doing this he has certainly struck one of the needs of the profession which all other text-writers, who have given the subject but a casual glance at the most, have left untouched.

UNDER the heading, "A Judicial Anthology," Henry A. Chauey, of the Detroit bar, contributes to the December, 1892, and January, 1893, *Green Bag* an interesting collection of poems written by celebrated lawyers and jurists. The December issue contains British specimens, and the January issue, American specimens. The idea of the collection is an original one, and the article demonstrates that the legal mind is not entirely devoid of sentiment or poetic imagination. The British fragments of verse are by Charles Abbott, upon "His Wife and Children;" Francis Bacon, on "The Ninetieth Psalm;" William Blackstone, in "A Lawyer's Farewell to His Muse;" Charles Synge Christopher Bowen, on "Virgil's

Descent into Hades;" John Duke Coleridge, on "A Prayer;" John Taylor Coleridge, "From Catullus;" Thomas Denman, "Horace, Book III, Ode 29;" Matthew Hale, "Simeon's Song;" Thomas Erskine, "Erskine's Protest;" John Scott, "To His Wife;" Edward Thurlow, "The Harvest Home;" and Philip Yorke, "Sir Lyttleton Powis' Charge." The American specimens are; Horace P. Biddle, "When I Am Dead;" James Valentine Campbell, of the law school, "The University of Michigan," an ode read at the opening of the "Great Hall" of the University, in 1873; Salmon Portland Chase, "To Miss L. C. L.;" Nathaniel Chipman, "Paraphrase from Anacreon;" Job Durfee, "Hymn by Twilight;" Thomas Durfee, "Constancy to the Ideal;" Francis Mills Finch, "Nathan Hale;" Melville Weston Fuller, "Grant;" John Baunister Gibson, "Retrospection;" Theophilus Parsons, "A Letter to His Little Girl;" Joseph Story, "Advice to A Lawyer;" and John Trumbull, "The American Tories."

ON the eleventh of January, Judge Henry H. Swan rendered the decision of the United States circuit court in the case of *City of Detroit v. The Detroit Citizens' Street Railway Co.* Barring a discussion of the correctness of this decision, the fact that such an opinion has been rendered, has an important bearing both upon our state and federal jurisdiction. The opinion was given on a motion to remand a suit in equity which had been removed from the district court of Wayne county, into the federal courts. The motion was denied principally on the ground of local prejudice. The decision reads: "The present judges are all candidates for re-election. * * It is very clear that the citizens of Detroit generally are impressed with a feeling that the street railway company has abused its privileges, etc. * * A decision in this case adverse to the city of Detroit would probably cause many electors of the city in the approaching election, convinced of the righteousness of the city's cause, to vote against the judge rendering the decision, and no judge could be unconscious of that fact in passing upon the case."

This decision cannot but imperil the theory upon which our state elective system stands. No case can possibly arise without the existence of more or less prejudice. If no judge can be unconscious of the wish of the voters within his jurisdiction his opinions can be but a refined statement of mob law, or an echo of the passing majority. If local prejudice be the criterion for taking cases out of the state courts, they will soon be robbed of jurisdiction; or, either we must abandon the plan of electing our judges, or substitute some other method which will retain all the virtues and none of the vices of the elective system. If this decision be correct the elective system is radically wrong, our personal feeling, the almost unanimous opinions of our ablest and truest judges, as well as the judicial experience of our people to the contrary notwithstanding. There is a growing conviction that the federal courts, from their creation, have shown a tendency to enlarge their jurisdiction, having gradually worked beyond the limitations set for them by the constitution, until now the one cry of the supreme court is for relief. On another page we quote Judge Henry C. Caldwell's criticism of this tendency, which has made necessary his own court. "There would have been," he says, "no necessity for the creation of the circuit court of appeals, if the jurisdiction of the federal courts had been restricted within the proper limits." The decision rendered by Judge Swan will likely become a leading precedent, and thous-

ands of cases hitherto decided by state tribunals, will be carried into the federal courts, and help to further crowd their already overburdened dockets.

Acquiescing then, as we must, in this decision, what course lies open to us? Danger foreseen makes us responsible for some immediate remedy. The method followed in the United States courts would seem to avert this particular danger. However, there is but little probability that the people would ever approve of the necessary change admitting such a provision into the constitution, and for the present, at least, this plan, however desirable, might as well be abandoned. Would not all the requirements be met by lengthening the term of office, say to ten years for circuit judges, and fifteen years for judges of the supreme court, without eligibility for re-election? The one objection urged against this latter method is, that the services of a wise and faithful judge must be dispensed with just at the time he is best prepared to serve the public. This objection is more than answered by the benefits which would flow from such a practice. First, each election would bring forward a representative of the people; and secondly, any suspicion of undue influence would be averted. This plan is eminently practicable, and promises more than any of the schemes at present in vogue. The results would be immediate and efficacious. The judiciary committee of the present legislature is in duty bound to take some notice of this decision, and we commend to their careful consideration the long single term plan.

AMENDMENT OF STATE CONSTITUTIONS.—At the recent meeting held at Lansing for the purpose of forming the Political Science Association, Judge Thomas M. Cooley read a paper on "State Bank Issues in Michigan—A Retrospect of Legislation." In the course of the paper, reference was made to a question of the highest importance relating to the amendment of state constitutions, and a view was presented that, if sound, must have the effect to render invalid the recent banking legislation that has been adopted in this state.

The paper began with the granting of the first charter for a bank in the territory of Michigan by the governor and judges in the year 1805, and proceeded step by step to give a summary of the legislation from that day to the present with the results which followed its being carried into practical effect. Special attention was of course paid to wild-cat banking, and the action of the people subsequently, whereby they expressed their determination that nothing of the kind should again be possible within their own state. To show this, he gave the provision of the constitution of 1860 on the subject of banking, that "No banking law, or law for banking purposes, or amendments thereof, shall have effect until the same shall, after its passage, be submitted to a vote of the electors of the state at a general election, and be approved by a majority of the votes cast thereon at such election;" also the requirement in the general law for the incorporation of banks passed in 1857, that each bank should deposit with the state treasurer the evidence of public debt of the United States, or of this state, or of certain other states named, which had always preserved their credit unimpaired, to secure the issue of its circulating notes; also the amendments to the constitution adopted in 1861 making the officers and stockholders of every banking corporation or association personally liable for all notes or paper credits issued, to circulate as money, during the term

of their being officers or stockholders, and that for all banks organized under general laws, the legislature shall provide for the registry of the bills, and their security to the full amount by state or United States stocks deposited with the state treasurer and bearing interest, and also that in case of insolvency, the bill-holders shall be entitled to preference, in payment, over other creditors. Judge Cooley then proceeded as follows:

"By these amendments, the constitutional provisions on the subject were made and now remain as complete and ample for the protection of bill-holders as those to be found in any other state or country. If there is any exception to this broad general statement, it must be one made by a section incorporated in a general law relating to banking, but not referring to banks of issue, adopted by the legislature of 1887, and submitted to and adopted by the people at the next general election thereafter, less than one-sixth of the electors voting thereon. This section provides that, 'The legislature may at any regular session thereof alter or amend this act, or any part thereof, by a vote of two-thirds of the members of the senate and house of representatives constituting said bodies; and hereafter it shall not be necessary to submit any such proposed alteration or amendment to the electors of the state for adoption or approval, but all such acts shall be valid and effectual when so passed by the legislature and approved as other laws are in accordance with the constitution of this state.' It seems to have been assumed that this section, being plainly inconsistent with the constitutional provision requiring all banking laws to be submitted to and approved by the people, would operate as a constitutional amendment. This assumption seems not very plausible. The constitution requires that no law shall embrace more than one object which shall be expressed in its title. A proposal to amend the constitution is a very distinct object by itself and independent of any legislation, though it may be upon the same subject. Now the title of this law gives no intimation that there was embodied in it a proposition to amend the constitution, nor were the people so informed when it was submitted to them. The public authorities, after it had received a favoring vote, did not seem to understand that the constitution was thereby amended, for in publishing that instrument in full as was done in the legislative manuals for 1889 and 1891, they give it in full precisely as it stood before this banking law was adopted, and thereby informed the people of the state and of other states and countries that a popular vote was still required to give a banking law effect. How could the authorities have done otherwise when the provision in this law on the subject did not assume to add a section, line, or word to the constitution, or to strike a section, line, or word from it? Then if this clause in the law changes any part of the constitution because of its repugnancy to it, to what extent does it change it? Under the full power it purports to give to the legislature over the subject, may that body do away with the personal responsibility of officers and stockholders in banks, or provide for the taking of anything they may see fit to have accepted, as security for banking currency? No one can answer such questions until the courts have passed upon them; and when their action is invoked they will be very likely to say that a proposal to amend the constitution must be submitted to the people as a distinct proposition, showing exactly how that instrument is to be changed by its adoption, and so that an elector can vote on it as he pleases without being obliged at the same to vote in the same way upon something else, as to which his unbiased action might be different."

STATE BAR ASSOCIATION MEETING.—The special meeting of the Michigan State Bar Association, held at Lansing on January 17, demonstrated that when the occasion demands it, the lawyers of Michigan can get together, in force. The question that came before this meeting for discussion and action is one which immediately concerns the attorneys of the state, and consequently the meeting was largely attended, representatives from almost every section of the state, and the ablest lawyers of the state, being present. A more brilliant assemblage of Michigan's legal talent has probably never before been convened. The discussion was earnest but dignified. The members of the association were very nearly of one mind as to the proper method of relieving the supreme court from the pressure of accumulating business. Those who took the most prominent part in the proceedings were attorneys who were qualified by experience, training, and special preparation to deal with the problem understandingly, but it was not until every other scheme or hobby had been given a fair hearing, that the association decided to recommend to the legislature the plan embodied in the bill since drafted by Mr. George P. Wanty of Grand Rapids, and published in this journal upon another page. This bill, or one similar to it in nearly every respect, differing only as to details, will go to the legislature backed by the practically unanimous opinion of the Michigan State Bar Association, which numbers among its members a large majority of the most distinguished lawyers in the state. What the legislature will do in the premises is, of course, only a matter of conjecture, but it is fair to assume that this bill, coming as it does from those who are the only men thoroughly qualified to prepare such a measure, will receive favorable consideration from the legislature, and be enacted into a law with the promptness which the urgency of the case demands.

Fortunately the discussion of the various plans for the relief of the supreme court was taken stenographically, and as there is very much of interest and value contained in the remarks made at the meeting, we present here a synopsis of them, regretting that lack of space prevents us from publishing them in full. Prof. C. A. Kent of Detroit opened the discussion, after the reading of the report of the committee, which recommended the establishment of an intermediate or appellate court. He favored the adding of one or more judges, and said, "every man wants to go to the supreme court, no matter how small an amount is involved. Instead of establishing this court to take care of the increased business, I think we might do something to lessen the amount of the business of the supreme court. I do not believe in enlarging the number of courts at all. I think instead of decreasing the work we would find at the end of the year that we had only another stage to go through." Judge A. B. Morse of Grand Rapids, spoke in opposition to an intermediate court. He said: "A constitutional amendment is necessary to establish an intermediate court. You have yet to appeal to the people, and when the people understand that its jurisdiction is limited, it will never pass. A case involving a small amount has just as much right in the courts as one involving a larger sum. My opinion is in favor of increasing the number of judges. I should increase it to eight judges and have two divisions of the court. That plan works in Missouri and has been adopted in the state of New York." Mr. Benedict of Manistee favored an increase of the number of judges. He said: "In 1883, I had a case in the state of Ohio which was appealed to the supreme court and was decided by what was called a 'supreme court commission,' and I found that the supreme court of Ohio

and the legislature had passed an act authorizing the governor and senate to appoint five justices to hold the office for two years. It has met with approval, and it has occurred to me that the supreme court of Michigan might be increased and divided into two divisions, and hold their sessions alternately, and as far as their division is concerned, be a final disposition of the case. Where there was a constitutional question, or where there was one of vast importance, it might be referred to the entire supreme court." Mr. E. W. Pendleton of Detroit, suggested that in case the decisions of the appellate court were final, as stated by the committee, "it would be necessary that separate reports be published for the decision of this court and that might possibly lead to embarrassment, if the supreme court should arrive, in certain cases, at conclusions opposed to those of the appellate court." Hoyt Post of Detroit, endorsed the remarks of Prof. Kent and Judge Morse, and added, "If one additional judge was added to the supreme court it could be easily divided into sections of three and a provision, or with an understanding with the judges themselves that if in all cases brought before each section the judges were not unanimous in their opinion, the question might be argued before the full court. For my part, I would rather have the unanimous decision of three members of the supreme court, with the understanding that each one had given careful attention to the case, than to have the opinion of five justices and think that they had not given it the attention it should have. When the business increased and became so large as to require further relief the addition of three more would give another section, and so on." Prof. B. M. Thompson of Ann Arbor, endorsed Mr. Post's views, and said, "Our present system has worked well for a quarter of a century, and has been entirely satisfactory; and this is good reason for continuing it. I think relief can come by increasing the court one or two members, to sit and hear cases." C. P. Black said, "I had the honor of being a member of the legislature of 1885, and a member of the judiciary committee of the house. I remember well the bill that was presented to limit the right to appeal. When it was presented I was in favor of something of that kind to clear up the docket of the supreme court, but after hearing from gentlemen who came from all over the state, I became convinced that it was not a proper course to take. In the first place, as is well contended, the creation of a court for the administration of justice is not a question of expense, but it is a matter of right to be extended to every citizen of the state. The amount in litigation may not be large, yet every man has the right to have his case settled in the same way that any other person's is settled. I believe it is better to have one court of last resort and settle that question by the supreme court, and so believing, I am opposed to this report." John C. Patterson, of Marshall, member of the committee, said: "It seems that this association is in favor of two courts; they are in favor of having the supreme court cut in two and split in sections. No five supreme judges, no nine supreme judges, can examine all these records and conditions and point out all the legal principles that arise in the supreme court. The history of this state is not alone. Ohio and New York have gone through the same experience, as well as the supreme court of the United States. Here is the plan of the committee: All questions involving personal liberty shall go to the supreme court; all questions involving the right to property shall go to the supreme court when the amount shall be beyond a certain sum. The amount of jurisdiction should be fixed high enough or low enough to relieve the supreme court of its burden. If we provide

another court for the smaller cases, it can probably be arranged so that type-written copies of the briefs and records can be used, thus doing away with the expense of printing. The appellate court could hold a session in Grand Rapids, another in one of the northern peninsula towns, and one perhaps in Saginaw, thus bringing justice nearer home." James H. Campbell of Grand Rapids, doubted the expediency of increasing the number of judges. He said, "I have thought that perhaps some remedy might be found in the correction or change of the proceedings. I know of a case which was appealed to the supreme court with 86 assignments of error. Now it is not possible for any circuit judge to commit 86 errors. To increase the membership of this court might do some good, but not very much. If it was divided there would be one-half coming in and reporting one way on a case and the other division deciding the same question another way. Our laws would be in hopeless confusion." Professor J. C. Knowlton, dean of the University law school, Ann Arbor, said: I am decidedly opposed to an appellate court for the reasons that have been stated, and many others that have not been suggested. The first is, that in going from the circuit to the appellate court, who is to determine the question of jurisdiction, who is to pass upon it? If you have an appellate court, you must have a new practice, for it is a new court, and you must also have a new set of officers. The supreme court is known as the court of last resort. How gratifying it would be to state to the litigant that the supreme court is the court of last resort, and you cannot get there! I do not think that it would expedite matters at all. In order to expedite business there must be two divisions of the supreme court hearing cases, and if there is a dissenting opinion, the party would have an opportunity to be heard before the entire court." Mr. T. F. Shepard of Bay City, thought lawyers should have relief from the rule of the court that allows them only one hour for the argument of a case, and fifteen minutes for motions. He added: "What I would be glad to see in the supreme court is this: I would have a part of them have the chancery cases and the other take the law cases, and where important constitutional questions were involved, of statutory construction or something of great public importance, let the entire court sit and hear those matters." Attorney-General Ellis would have the number of judges increased to eight. R. A. Montgomery of Lansing spoke in favor of adding five judges to the present court, and providing that one-half constitute a quorum. Benton Hanchett of Saginaw urged that the bar association go no farther than simply to recommend an increase in the number of judges or the establishment of an appellate court, and to leave the details to the legislature or, even better, to the judges themselves.

The matter now rests with the legislature and governor. The State Bar Association has done its duty, and its recommendation, being as it is, the result of the best legal judgment of the state, should carry great weight with the members of both houses. Whatever action is to be taken, should be taken at once.

OBITUARY.

RODNEY MASON.

Colonel Rodney Mason, of Detroit, died suddenly at Jackson, January 22, 1893. He was making a professional visit to the latter city and had retired the previous night apparently in excellent health. It was found that he had literally "fallen asleep," as there was every indication that he had passed peacefully away after retiring as usual.

Colonel Mason was a native of Ohio, where he was born October 20, 1824, and although well past the meridian of life, he apparently retained the strength and vitality of youth. His sudden death came as a greater surprise as he had betrayed no suggestion of infirmity. He was admitted to the bar in 1848. At the outbreak of the war in 1861, Mr. Mason was made assistant adjutant general of the state of Ohio, and afterwards served as colonel in the field in the army of General Sherman. After his regiment was mustered out, he took up his residence in the city of Washington and continued the practice of the law, devoting himself especially to patent cases. He was a man of extended experience in his chosen field and conducted many important cases in the various federal circuit courts. As is often the case with patent attorneys he was not so intimately known by the local bar, but those who had the pleasure of his acquaintance learned to respect his ability and admire his accomplishments. He possessed a character combining strength and force with gentle and genial spirit.

It is seldom that a meeting of the members of the bar is marked with the evidences of personal bereavement that were shown at the bar meeting of January 24. Appreciative and discriminating tributes were offered at that time by Mr. Chas. F. Burton, Col. H. M. Duffield, Col. E. T. Wood and also by Mr. Jesse Smith who had been intimately associated for a number of years with Colonel Mason. Appropriate resolutions were drafted by a committee composed of Mr. R. A. Parker, Hon. Henry H. Swan and Hon. Geo. S. Hosmer. The bar of Wayne county and of the federal court will cherish the memory of Colonel Rodney Mason.

Edw'd W. Pendleton.

OSCAR FITZ-ALLEN WISNER.

Oscar F. Wisner, surviving member of the firm of Wisner & Draper, of Saginaw, died at his home in Saginaw on Thursday, January 5. Paresis was the immediate cause, but Mr. Wisner had been in failing health for several months previous, due to too close attention to business. His law partner, the Hon. C. Stuart Draper, passed away on August 6, 1892, while on board ship returning from the continent of Europe. Mr. Wisner was one of the leading members of the Saginaw bar, and his firm one of the strongest and best known in the state.

Mr. Wisner was born at Pontiac, January 4, 1838, and was the son of George W. Wisner, a prominent attorney of that city. He studied law with his uncle, the Hon. Moses Wisner, afterwards governor of Michigan,

and during his uncle's term of office acted as his private secretary. Mr. Draper, his future law partner, studied in the same office. Mr. Wisner was admitted to the bar at twenty-two years of age. He located in Chicago, but resided in that city only for a brief period, when he returned to Pontiac. In 1872, he formed the partnership with Mr. Draper, and the firm opened offices in Saginaw. About the year 1880 the firm was retained by the Flint and Pere Marquette Railroad Company, and assisted Mr. William L. Webber, the general solicitor of the company. On January 1, 1892, they succeeded Mr. Webber as general solicitors and attorneys for the railroad company. In 1861 Mr. Wisner married Miss Elizabeth Kerr, of Lansing, who survives him. A brother, Henry C. Wisner, resides in Detroit.

Mr. Wisner stood among the leaders of his profession in the state. He was a close student, a logical reasoner, and had a peculiarly direct and forcible manner in addressing a court or jury. He used few words, and made no attempt at oratory or dramatic expression, but commanded attention by his straightforward, clear-cut manner of statement. He was a good business lawyer, also, and was scrupulously careful in looking after the details of his clients' business. For one term he served as city attorney of East Saginaw, and in that capacity gave eminent satisfaction. He gave his entire attention to his extensive practice and steadily refused to allow his name to be used for political preferment. He became identified at different times with enterprises of a business nature, and at the time of his death was a member of the James Stewart Company, and a stockholder in several banks. He was the first president of the East Saginaw club, in the affairs of which he had always taken an active part.

The bar of Saginaw passed eulogistic resolutions at a meeting held January 6, 1892. In speaking upon the resolutions, Mr. William L. Webber said: "I have always found him reliable and true to his promises, and always courteous and ready to yield anything that did not affect the interests of his clients." The *Saginaw Courier-Herald* says of him: "He hated shams, hypocrisy and deceit. He loved honesty and sincerity, for in his own character and life those cardinal virtues occupied a sacred niche. He was not a member of any Christian orthodox denomination, and yet his Christianity was of the highest type. He believed in the religion of free thought and good deed—of character and of honest endeavor, of liberty and of sympathy—in religion for every day, for the world in which we live, for the present; the religion of intelligence of work and in the ceremonies of honest labor. He lived for this world; if there be another he will live for that. He was essentially an honest man, a kind neighbor, a steadfast friend; virtues that are in themselves a most fitting epitaph."

MONTHLY RECORD OF SUPREME COURT DECISIONS*

ACCOUNTING—Turnbull v. Monghan. Montgomery, J. Appeal from Alpena. Modified and affirmed.

AGENCY—Husband and wife—Identification of principal—Challenge of a juror for cause, on account of age. Luebe v. Thorpe. Montgomery, J. Error to Shiawassee. Affirmed.

ASSUMPSIT—Account stated—Proof of, when question for jury. Rosenfield v. Fortier. Montgomery, J. Error to Wayne. Reversed.

ASSUMPSIT—Right of widow to sue in individual capacity upon promises made to husband for benefit of wife. Wheeler v. Stewart. Error to Lenawee. Affirmed.

ASSUMPSIT—Services rendered—Claim against intestate—Computation of interest on promissory note. Nye v. Estate of Harvey King. Durand, J. Error to Wayne. Affirmed.

ATTACHMENT—Chattel mortgage filed in a wrong county—Failure of agent to follow instructions. First Nat'l Bank of Kalamazoo v. Guntermann, Grant, J. Error to Bay. Affirmed.

BILL in aid of execution—Conveyance to defraud creditors. Hicks v. McLachlan. McGrath, J. Appeal from Isabella. Reversed.

BILL in aid of execution—Conveyance without consideration, and in fraud of creditors. Ball v. Phenicie. Montgomery, J. Appeal from Branch. Affirmed.

BREACH OF WARRANTY—False representation—Caveat emptor—Admissibility of testimony as to reputation—Damages. Maxted v. Fowler. Montgomery J. Error to Manistee. Reversed and new trial ordered.

CARRIERS—Liability for goods sent C. O. D. and destroyed by fire while held for payment—What notice to consignor required. Hesse v. Amer. Express Co. Grant, J. Error to Marquette. Reversed.

COMMISSION—When right to, not implied from a general promise to pay—Middleman. Montrose v. Eddy. Durand, J. Error to Saginaw. Affirmed.

COMMON COUNTS—Acceptance of a draft—Liability under money counts for money paid for use of another. Bay City Bank v. Lindsay. Montgomery, J. Error to Wayne. Affirmed.

CONTRACT for sale of lumber—Transfer of title—Loss by fire. Stade v. Lee. Grant, J. Error to Saginaw. Reversed and new trial ordered.

CONTRACT for services—Discharge without cause—Right to compensation for whole period of contract. Koehler v. Buhl *et al.* Hooker, C. J. Error to Wayne. Reversed.

CONTRACT—Admissibility of evidence to prove a custom, or usage, in a particular locality, to charge plaintiff for board of employes. Pennell v. Delta Transportation Co. Long, J. Error to Cheboygan. Reversed.

CONTRACT—Right of school board to make purchase without authority from the district. Western Pub. Co. v. District No. One, Locke Township. Durand, J. Error to Ingham. Affirmed.

* Copies of the opinions of the supreme court may be obtained, upon application, from Charles C. Hopkins, clerk of the supreme court, Lansing, Mich.

CONTRACT, when no time fixed—*Quantum meruit*. Jewell v. Paron. Montgomery, J. Appeal from Delta. Reversed.

CONTRACT—What constitutes authority of agent to make contract. Austrian v. Springer. McGrath, J. Error to Kent. Affirmed.

CONTRACT—Correction of, to correspond with agreement—Suretyship. Stevens v. Pendleton. Durand, J. Error to Wayne. Affirmed.

CONTRACTS—Want of mutuality. Cooper v. Lansing Wheel Co. Appeal from Ingham circuit. Reversed.

CONSTRUCTION OF A DEED—Abandonment to render a defeasance operative, 78 Mich., 615. Hicks v. C. & C. S. R'y. Grant, J. Error to Lenawee. Affirmed.

COUNTY COMMISSIONER OF SCHOOLS—Qualifications for—Validity of teacher's certificate—Act No. 147, public acts of 1891, construed. People v. Howlett. Long, J. Error to Livingston. Affirmed.

CRIMINAL LAW—Rights of accused to choose mode of trial in justice's court. People v. Steele. Grant, J. Certiorari to Ionia. Reversed.

DISSEIZIN—Husband and wife operating a joint lease. Gillespie v. Beecher. Durand, J. Error to Wayne. Reversed.

ELECTIONS—County treasurer—Recount—Irregularities—Ballots bearing distinguishing mark, a vignette. Lindstrom v. Board of Canvassers, Manistee Co. Per curiam. Mandamus denied.

ELECTIONS—Justices of supreme court—Time of application for recount—Legislature can recount. Newton v. Board of Canvassers of Wayne Co. Per curiam. Mandamus denied.

ELECTIONS—County treasurer—*Quo warranto* the remedy after recount—Packard v. Board of Canvassers of Menominee Co. Per curiam. Mandamus denied.

ELECTIONS—State senator—Legislature judge of elections of its members. Wheeler v. Board of Supervisors of Manistee Co. Per curiam. Mandamus denied.

EVIDENCE—When testimony as to the value of an article may be introduced. Banghardt v. Hyde. Long, J. Error to Shiawassee. Reversed.

EXECUTION—*Bona fide* purchase—How far knowledge of sheriff imputed to purchaser—Right to question sheriff's return—Luton v. Soper. McGrath J. Error to Newaygo. Affirmed.

FORECLOSURE BILL—Rights of one who combines with another for fraudulent purposes. Pearce v. Ware. Montgomery, J. Appeal from Marquette. Affirmed.

HIGHWAY, Laying out of—Omission to serve notice of hearing. Welch v. Hodge. Montgomery, J. Certiorari to commissioner and clerk. Proceedings quashed.

INJUNCTION to restrain common council from issuing bonds to the amount of \$200,000 to build bridge, by taxpayer. Tillotson v. City of Saginaw. Grant, J. Appeal from Saginaw. Affirmed.

INSOLVENCY—Right to an order directing a bank cashier to pay over funds upon which a check had been drawn and accepted before the failure of the bank. Sherwood v. Milford State Bank. Durand, J. Appeal from Oakland. Affirmed.

INSURANCE—Validity of condition in certificate that suit must be commenced within a year. Law v. N. E. Mutual Life and Accident Ass'n. Durand, J. Error to Wayne. Affirmed.

INSURANCE—Effect of limitations contained in the policy. Ahlberg v. Gorman Ins. Co. Long, J. Error to Wayne. Affirmed.

LANDLORD AND TENANT—Construction of lease—Sufficiency of notice to quit. *Lane v. Ruhl*. Grant, J. Error to Wayne. Affirmed.

LIBEL—Publication libellous *per se*—Words wounding one's feelings—When special damage must be alleged—Instructions to jury. *Hall v. Evening News Association*. Montgomery, J. Error to Wayne. Affirmed.

LIFE INSURANCE—Actions to recover, in whose name to be brought—Mutual benefit associations—Who entitled to recover against. *Silvers v. Michigan Mutual Benefit Association*. Long, J. Error to Lenawee. Reversed.

LOCAL OPTION LAW—Druggists' license—*Bishopp v. Circuit Judge of Hillsdale Co.* Per curiam. Mandamus denied.

MANDAMUS—When not granted to compel recount of votes. *Wheeler v. Board of Canvassers of Manistee County*. Per curiam.

MANDAMUS—When will not be granted to compel the imposition of an alleged tax. *Board of Supervisors of Cheboygan County v. Township of Mentor et al.*

MANDAMUS, to compel supervisors to list and assess persons of property, when denied. *Maurer v. Cliff*. McGrath, J. The writ denied.

MECHANIC'S LIEN—Waiver of. *Blakely v. Moshier*. Durand, J. Appeal from Kent in chancery. Reversed.

MORTGAGE—"Debts against the estate"—Power of administrator to mortgage to pay another mortgage—Construction of How. Stat., 6105, as amended by Act No. 67, Laws of 1889. In re. *Lambie estate*. McGrath, J. Error to Wayne. Affirmed.

MUNICIPAL—Authority to issue bonds. *Council of Muskegon v. Gow, Mayor*. Per curiam. Mandamus issued.

MUNICIPAL LAW—Salary of street commissioner—How fixed. *Fournier v. Mayor and Council of West Bay City*. Per Curiam. Mandamus issued.

NEGLIGENCE, Contributory—Defective sidewalks—Duty to repair—Admissibility of certain evidence—Jurors over sixty, exempt. *McGrail v. City of Kalamazoo*. Long, J. Error to Kalamazoo. Affirmed.

NEGLIGENCE—Liability for injury caused by defective elevator. *Robinson v. Wright & Co.* McGrath, C. J. Error to Wayne. Reversed.

NEGLIGENCE—When standing on the platform of a car is contributory negligence—Charge to jury. *Bradley v. Ft. Wayne & Elmwood R'y Co.* Long, J. Error to Wayne. Reversed.

NUISANCE—Proofs of knowledge of. *Kern v. Myll*. McGrath, J. Error to Wayne. Reversed and new trial ordered.

PARTNERSHIP—Notice of withdrawal of one co-partner—Liability of survivors—Dissolution. *Berridge v. Lobdell, et al.* Long, J. Error to Mecosta. Affirmed.

PARTNERSHIP—Right of married women to become partners, so as to bind their separate estate—Accounting. *Vail v. Winterstein*. Appeal from Sanilac. Modified and affirmed.

PARTNERSHIP—Suit to recover for overdrafts by one partner. *Gladstone Nat'l Bank v. Keating*. Grant, J. Error to Wayne. Affirmed.

POOR DEBTORS' RELIEF—How. Stat., 209 construed—Liability under bond for jail limits. *Griffin v. Henning*. Long, J. Certiorari to circuit court commissioner. Proceedings quashed.

QUO WARRANTO—What action of the chairman of an election district will vitiate the vote. *Att'y Gen'l v. McQuade*. New trial ordered.

RECEIVERS—Actions against one who borrows as agent—Estoppel. *Baumann v. McCormick*. Grant, J. Error to Manistee. Affirmed.

REFLEXIN—Testimony admissible to prove ownership of property levied upon to satisfy a judgment. *Miller v. Hanley*. McGrath, C. J. Error to Wayne. Reversed.

RULING OF COURT—Discontinuance—Submission to jury. *Codd v. Seitz*. Durand, J. Error to Wayne. Affirmed.

SET-OFF—Right of attorney to charge client face value of a mortgage which he purchases at a discount. *Cleveland v. Miller*. Montgomery, J. Error to Lenawee. Affirmed.

SPECIFIC PERFORMANCE—Option for the purchase of land—Descent of leasehold interest. *Gustin v. Union School District of Bay City*. Hooker, C. J. Appeal from Bay in chancery. Affirmed.

SPECIFIC PERFORMANCE—Oral agreement to convey land, when enforceable in equity. *Russell v. Russell*. Montgomery, J. Appeal from Newaygo. Affirmed.

STATUTE OF FRAUDS—Liability for debt of another. *Armitage v. Saunders*. Montgomery, J. Error to Wayne.

STATUTE OF LIMITATIONS—When begins to run upon judgments. *Snyder v. Hitchcock*. Montgomery, J. Error to Ionia. Reversed.

STATUTE OF LIMITATIONS—When begins to run as to infants. *Keating v. M. C. R.R. Co.* Long, J. Error to Ingham. Reversed.

STREET-RAILWAY COMPANIES—Liability to persons driving on street car tracks. *Kornetzke v. City of Detroit*. McGrath, J. Error to Wayne. Reversed.

SUPERSEDEAS BOND—Set-offs, when outlawed. *Busch v. Jones*. Durand, J. Error to Wayne. Reversed.

TAXATION—Effect of failure of board of review to meet on day prescribed by statute. *Township of Caledonia v. Rose*. Grant, J. Error to Shiawassee. Reversed.

TAXATION—Right of state to tax Indian lands—Construction of sec. 52, act 195 of the laws of 1889. *Auditor Gen'l v. Williams*. Durand, J. Appeal from Isabella. Affirmed.

TAXES—Lands purposely omitted from the tax roll. *Auditor Gen'l v. Prescott*. Montgomery, J. Appeal from Iosco. Reversed.

TRIAL *de novo*, right to, in the supreme court—Right to review conclusions of trial judge upon whole testimony. *Cumming v. Shick*. Montgomery, J. Error to Ogemaw. Affirmed.

TROVER—Sheriff holding under attachment—Rights of plaintiff claiming under chattel mortgage—Charge. *Ferris v. McQueen*. Long, J. Error to Kent. Reversed.

TRUSTS—How created—What instrument creating must contain—Construction of § 6179 How. Stat. *Renz v. Stoll*. Montgomery J. Appeal from Wayne. Affirmed.

UNDUE INFLUENCE—Death-bed discharge of mortgage—Admission of testimony. *Worthington v. Major*. McGrath, J. Appeal from St. Joseph. Reversed.

WILLS—Unintentional omission to provide—Province of jury. *Stebbins v. Stebbins*. Durand, J. Grant and Long, J.J. concur. Montgomery, J. and McGrath, C. J., dissent. Certiorari to Wayne.

WITNESS FEES—Amount allowable where detained by court upon failure to give bail. *Robinson, guardian v. Chambers, Judge, etc.* Per curiam.

NOTES OF RECENT MICHIGAN DECISIONS.

CARRIERS, WHEN LIABILITY AS INSURER CEASES.—The position of the supreme court upon this knotty question was very clearly defined in *Hasse v. American Express Co.* (December 22, Grant, J.). Plaintiffs, who are clothiers in Detroit, delivered certain packages to defendant addressed to certain of their customers in Marquette, marked C. O. D. The consignees were not able to receive the goods and notified the defendant's local agent to hold them for a short time, until a day named. The agent thereupon notified the consignors of the cause of delay in delivery, and stored them in defendant's warehouse. Fire destroyed the warehouse and contents, without fault of defendant. Plaintiff sought to hold defendant liable as common carrier and insurer. The court held differently and maintained that the liability of the express company at the time of the fire was that of warehouseman and not common carrier. "The defendant's contract as common carrier," the court say, "was to safely carry the goods to their destination, to notify the consignees of their arrival, and to offer delivery upon payment of the amounts. This duty it had fully performed, and with such performance its liability as a common carrier terminated. Its further duty was to safely store and care for the goods, hold them a reasonable time for the consignees to pay, if they were not ready to pay immediately, and then to notify the consignors. The liability meanwhile was that of a warehouseman.

In support of this principle are cited: *Hutchinson on Carriers*, § 392; *Sinn v. Steamboat Co.*, 49 N. Y. 442; *Adams Express Co. v. Darnell*, 31 Ind. 20; *Marshall v. American Express Co.* 7 Wis. 1; *Weed v. Barney*, 45 N. Y. 344. In the latter case the goods had been in the warehouse nearly a month after the time of arrival at destination, when they were destroyed by fire while waiting for consignee to call and pay for them. In that case no notice had been given the consignors, and it was held that no notice was essential. The court say in conclusion: "It is a matter of common knowledge that those sending goods by express with instruction to collect their value upon delivery, expect the express companies to retain them in order to give the consignees an opportunity to pay for and take the goods. Consignors so sending goods understand that the goods must be deposited in the storehouse of these companies. There is no reason under such circumstances in holding these companies to the strict liability of common carriers."

MARRIED WOMEN AS PARTNERS.—Can a married woman become a member of a firm, and thereby bind her separate estate, so that in an accounting for creditors it becomes liable for the debts of the firm? The supreme court, in *Vail v. Winterstein*, (Dec. 22, Long, J.), hold that she can. While incompetent to enter into partnership with her husband, yet she may do so with third persons and bind her separate estate as fully and to the same extent as she might through any other agency where married women are permitted to carry on business upon their sole and separate account..

BOOK REVIEWS.

MICHIGAN PLEADING AND PRACTICE AT COMMON LAW. Roswell Shinn. Chicago: T. H. Flood & Co.

It can hardly be said that Mr. Shinn's work travels over the same ground covered by Green's New Practice, but one would suppose that such was the case unless the new text book was examined carefully and its scope thoroughly understood. Green's Practice is hardly more than a digest of Howell's Annotated Statutes, while Shinn's Pleading and Practice is a logically arranged and carefully systematized treatise on the pleadings and practice in the courts of record of Michigan at common law in civil causes, with forms. It is a work which was prepared to meet a demand, for if it was not, T. H. Flood and Co. would not have risked its reputation as one of the most reliable law book publishing establishments in the country, by placing it before the lawyers of this state. It meets a demand for something of practical value. It has a number of features that will recommend it to busy lawyers, and not the least of these is the complete collection of forms. The forms are drawn from the most authoritative sources and have been modified according to the suggestions of the courts, so that they can be used with perfect safety, instead of those verbose and antiquated forms "whose decorated phraseology had become as useful as the wigs on the wise heads that sat in judgement on them."

Mr. Shinn dedicates his work to the Hon. Thomas O'Hara, judge of the second judicial circuit of Michigan. It is published in two volumes. The first volume treats of courts and their jurisdiction, actions and parties thereto, forms of actions, removal of causes, commencement of actions, and proceedings before the trial, things which the lawyer must attend to in his office before he goes into court. The second volume discusses the proceedings at the trial, in the supreme court, and miscellaneous proceedings which cannot be properly classed with common law actions, the latter a most admirable chapter. The second volume closes with a chapter upon the relation of attorney and client, an entertaining and instructive essay of thirty-five pages. The value of the index may be judged by the fact that it covers an even two hundred and fifty pages, a book in itself. The author apparently recognized the modern demand for thorough and comprehensive indexing.

We have a suggestion to make to the Michigan students attending the law department of the University of Michigan. Shinn's Pleading and Practice is a work which will be of more practical benefit to the embryo Michigan lawyer than any other text book used in the law school. It is arranged admirably for systematic study and a mastery of its contents is almost indispensable to a thorough preparation for practice at the bar of this state. It is classified and arranged in a manner very similar to Professor Knowlton's edition of Anson on Contracts, which has been found to be the most satisfactory work for study in use at the school. Mr. Shinn's treatment of courts and pleading and practice has the additional virtue of being entertaining. A lack of knowledge of the things which the book so

admirably teaches will prove decidedly embarrassing to a newly-fledged lawyer. There were one hundred and eighty Michigan students in the three classes of the law school last year, and it is probable that there are as many, if not more, this year. It is our opinion that a study of this work, by means of a quiz-club of Michigan students, would prove of inestimable benefit, for there is nothing in the book but what they *must* know ultimately.

THE RAILROADS AND THE COMMERCE CLAUSE.—Francis Cope Hartshorne, of the Philadelphia Bar. Philadelphia: University of Pennsylvania Press.

This is a new treatise, issued during 1892. It deals not only with a subject in which every industrial interest is concerned, that of transportation, but also with questions which have arisen in the immediate past, which are arising continually in the present, and which are certain to arise in the future, and demanding settlement with an emphasis which cannot be disregarded. Mr. Hartshorne has handled the subject with ability, and his work possesses the especial merit of being perspicuous. The treatment is clear, because it is analytic. Much of the mental labor of analyzing and classifying has been done for the reader by the author. We have taken especial pains heretofore in this department of the JOURNAL to commend legal text books, in the preparation of which particular attention has been paid to the indexing, arranging and classifying of the contents. Mr. Hartshorne has not only provided a table of contents and a very admirable and thorough index at the end of the book, but he has introduced a detailed table of contents of each section or paragraph, which he denominates the "analysis." The work is only 150 pages in length and printed in large pica type. It is, in fact, hardly more than an essay, but it contains within its covers a most comprehensive treatment of the litigation which has arisen since the passage of the inter-state commerce act. The aim of the author has been to present the actual state of the law as defined by the decisions of the supreme court; and, from a careful study of the decisions already made, to endeavor to deduce principles upon which, and the directions in which, the development of the law is likely to proceed. The work is divided into three parts. First, the power of congress, under the commerce clause, to regulate railroads; second, the commerce clause and the state railroad legislation; third, the commerce clause as affecting state taxation of railroads. The treatise is particularly valuable to railroad attorneys, and also to members of legislatures before which railroad legislation is likely to come.

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REFORM IN LEGAL PROCEDURE.

FRED A. MAYNARD.

From the beginning disputes have arisen among men. Until the end of time such will always be the case. In the absence of tribunals in which these controversies could be settled resort was had to brute force, and bloody conflicts were the result. The doctrine that might made right was followed whether believed in or not. Necessity compelled men to establish tribunals in which these contests could be settled in a peaceable way. And so through all the ages, in all countries and climes, efforts have been made to devise some method by which these contentions could be settled with as much justice as possible. It would require volumes to record the different methods which have been resorted to. One of the most instructive books of the future will be the one in which this matter is exhaustively considered. It will be conceded that the result to be aimed at is this: To establish a legal procedure by which controversies can be settled quickly, inexpensively, and as nearly right as possible. The practical question that addresses itself to every lawyer in Michigan, to every member of the state legislature, and to every citizen of the state interested in the administration of justice, is this: Have we here such a procedure? If not, how can we have one?

He indeed would be a benefactor of his race, worthy to be named for all time among the greatest of men, who could invent a legal machine by which the results above named could always be reached. We never can hope that exact justice will always be meted out and that without expense and delay. But we can do something in that direction. It was a favorite saying of a prominent member of our bar that one of the strongest facts which tended to convince him of an hereafter was this: "There must be some

court, somewhere, in which the wrongs that are done here in the name of justice, may be righted."

I do not desire to make an extreme statement, nor one not warranted by the facts appearing of record, and therefore admit that it may not be true, as claimed by some, that our present legal machinery is at least one hundred years behind the times. But I do insist that our present procedure is very defective and that many improvements could be made by which controversies could be settled in a much more business-like way, with as much certainty as at present, and with much less delay, and less expense to litigants and the people of the state. We live in the nineteenth century, in an age that is intensely practical, when time is measured by minutes and not by days. Facts and results are the potential factors of our day. Electricity, steam, the telegraph, telephone and stenography are the necessary adjuncts of our daily life. These conditions make it absolutely necessary that the controversy once started should be settled as soon as possible. The settlement of the dispute is the great fact to be reached. Once settled, the parties, in the forcible vernacular of the street, know "where they are at," and can make their plans accordingly. It is the uncertainty that kills. No man who has his all tied up in litigation can make plans for the future. The result of the suit may reveal the fact that he has nothing and that he must commence all over again. The quicker he knows that fact the better. The delay of years means his permanent ruin and the business men, in our great cities, have long since "gotten on to" this truth. Look at what is done every day at the board of trade. Two members get into a dispute in a matter involving thousands of dollars. They go at once before the committee on arbitrations, each side states its case, and a decision is reached. The parties know the result and they renew their operations in accordance therewith. If, instead of proceeding in this summary and extra-judicial manner to settle their controversy, they had sought redress in the courts, what would have been the result? In case it was appealed to the United States Supreme Court, they would probably have to wait five years before they knew the final result. In that time they would have spent thousands of dollars in litigation, they would have consumed months of valuable time and the best energies of their life in trying to win their law suit, and when the end is at last reached, some of the parties are dead, and the judgment is, in many cases, worthless. When such is the case is it surprising

that the business men of this country, finding no adequate remedy by the slow processes of the courts, have made one for themselves? Take the once great branch of legal work known as "collections." The great commercial interests of this country demanded a more business-like system of collecting claims. The result is the establishment of great commercial agencies, and business that once went to the lawyer's office is now done there or through the banks. And many of the great business houses of the country have long since, as the result of bitter experience, adopted the rule that the claim that cannot be collected without a law suit shall be charged to profit and loss account at once. In short, the demand has been made on the lawyers of this country for the adoption of legal machinery fitted for the day and the conditions in which we live. They have not complied and the result is the adoption of the methods that I have named and others that could be named. I do not speak of the thousands who suffer and prefer to stand loss of any kind rather than commence an action at law • which they know will be attended with so much delay and loss of various kinds, and in which the element of uncertainty cuts so prominent a figure. These are facts which no lawyer of any experience will deny. And the charge is made that the responsibility rests upon the legal profession. They have failed in their duty to furnish the people with the best machinery by which they can redress their wrongs. It would be interesting and not, I think, altogether unprofitable to state some of the reasons why the lawyers, as a body, have failed in instituting these legal reforms. But I do not care to enter upon that part of the case at the present time. It is sufficient to say that, although we have had many eminent lawyers and hundreds who were qualified to do this work, Mr. David Dudley Field has been obliged almost single handed and alone for nearly half a century, to make the fight for legal reform, and the most bitter opposition that he has encountered has come from members of the legal profession.

It has been the pride of our profession to boast of its conservatism. I accord to it its just meed of credit in that respect. I admit that the landmarks are not to be inconsiderately blotted out—that the precedents are not to be ignored without full and careful consideration. But I am forced to the belief that many other considerations have had weight in the obstructions which have been placed in the way of reform. The charge has been made that we are wedded to our idols, that having spent years in

an attempt to understand the mysteries and subtleties of the common law, and having learned by heart many of the high sounding, but now meaningless phrases contained in both law and equity pleading, we have become so attached to the system that we cannot give it up although admitting in private that we have entirely forgotten, or never knew, the reasons which led to the formation of the sentences we have just used. The truth is that lawyers adopt the profession as a means of gaining a livelihood. In proportion to their success, their time and strength is fully taken up in the discharge of the exacting duties of their daily life, and they have no inclination to change the present order of things and so they work on, content to leave it as they found it.

But, be the reasons what they may, the truth is that reforms have been forced upon us by laymen and by those outside the profession. It being assumed that our practice could be improved, the question will at once be asked what have you to suggest in that direction? Do you want a code? Are you not aware that the reports, in the state of New York and other code states, are filled with cases which have been taken to the higher courts simply on points of practice, and that we certainly would not gain in that respect? The answer to that question is this: That much has been learned since the year 1846, when the state of New York took the first step in the work of simplifying the procedure in the administration of justice. Mr. Field and his associates on the commission were lawyers of the old school indeed. Their legal education had been such as to naturally lead them to place the highest estimate upon the subtleties—the requirements and technicalities of the common and civil law. Considering the prejudice naturally resulting from their education and the time in which they lived, it is remarkable that the code which they prepared and which was approved by the legislature of the state of New York in 1848 should have made so many radical changes in legal methods. That the time had come when this change should be made is demonstrated by the fact that more than one-half of the states of this country have adopted substantially the New York code. That in 1873, England herself adopted its essential provisions, which have also been adopted by India and other governments. But as was to be expected the New York code, as originally adopted, was a most elaborate production and met with much opposition from the lawyers of that day. It was hard to accustom themselves to the new order of things and the courts of last resort were full of cases

taken there on questions of practice, and every few years has seen a new and amended edition of the code. Our lawyers know of this and always cite this fact when anything is said about introducing the code system in this state. They do not seem to be so mindful of the fact that as it exists to-day the practice is much more simple than when originally adopted and that now no lawyer in that state would willingly go back to the old system of practice. But many improvements have been made in other states, on the New York code, in the direction of simplicity, economy, and more business-like methods in the settlement of legal controversies. I have before me a letter written by a distinguished member of the Connecticut bar in which he speaks, in the highest terms, of the practical workings of the practice act adopted in 1879. He says: "The act has given entire satisfaction. It was the work of a body consisting of our most accomplished and experienced lawyers, and the brevity, simplicity and comprehensiveness of the work do full justice to the body from which it emanated. At first there was considerable opposition to its introduction from some of the older lawyers, but that feeling has entirely died away. I have yet to hear of any serious difficulties occurring in its construction or application, which is rather surprising considering the sweeping nature of the changes introduced. I think it would be impossible now to find a single lawyer, even among those who were most opposed to the change, who would be willing to return to the old system. The abolition of the distinction between equitable and legal cases, by permitting the plaintiff to demand both kinds of relief in the same action has been particularly beneficial. The line between the two at common law was so fine and oftentimes so obscure, that no amount of experience or care could insure the pleader against mistake. The superiority of our own practice act over the more elaborate codes of other states is sufficiently proven by the fact that in our own state scarcely any cases have gone to the supreme court on points of practice arising under the act, and no amendments of any importance have been made by the legislature since its adoption." It is certain that after years of experience, in no state or jurisdiction where the reform has once been introduced would any one seriously think of going back to the old practice. And the practical question for us to consider is this: Whether the time has not fully arrived when we too should take steps looking to a radical change in our practice and the adoption of more modern and business-like methods in the administration

of justice. In any discussion of this question it is necessary to have a clear understanding of what is sought to be accomplished and the limitations which surround it. It is essential to always bear in mind the great legal distinction which exists between the right and the remedy. We have inherited a great system of legal jurisprudence, founded and based on the unchangeable principles of right and wrong, and the everlasting law of God. The law as we now have it as a science, is the ripened fruit of all the ages that have gone before. No iconoclast should be allowed to enter into this holy temple and with sacrilegious hand strike down the images of justice enshrined therein. But so far as the east is from the west so far is the distinction between these legal principles and the machinery by which they are put into operation. In all civilized nations and in every jurisdiction these everlasting principles form the basis of their legal system, while the machinery or method of procedure varies in each. Principles remain; the procedure by which they are given effect should change as the necessities of the time require. It is also conceded that you cannot arbitrarily abolish the distinction, which in the nature of things must always exist between legal and equitable rights and remedies, nor can you rightfully deprive any person of as complete redress for every conceivable wrong done to him in his person and estate as he ever had or it is possible for him to have. But the code and every new practice act does require that, "whatever the nature of the right to be enforced or the wrong to be redressed may be, whether such as formerly would have been cognizable in either a court of chancery, or in a court of law, the simple form of a 'civil action' must be followed, in which a plain statement of the material facts constituting the cause of action, or the defense, must be set forth in concise language and without repetition. By one blow all the antiquated and cumbersome forms of actions are abolished; but all the various remedies known to the law still remain and are administered through the medium of a single civil action quite as certainly, with much less expense, and much more speedily than under our practice." All will agree that Mr. Shinn did a wise act in his late work on pleading when he dropped from his "forms of pleading" those (as he says) "now abrogated and useless phrases which did such good service for numberless decades, not to say centuries, and whose decorative phraseology had become as useless as the wigs on the wise heads that sat in judgment on them." I believe the preservation of the

ancient forms of action a most unwise thing. I also believe that the time has come when the distinction between law and equity should be dropped. We once had two separate and distinct courts, presided over by the judge and the chancellor. The course of procedure was entirely different, and they were in fact as well as in name separate and distinct. But now we see the judge of the law court to-day, and to-morrow we see the same man sitting in the same chair in the same room, the chancellor of the court of equity. To-day in the trial of one case he has nothing whatever to do with determining the facts. To-morrow he alone hears the testimony and finds the facts. It is amazing that in this day and generation, in this state of Michigan, two such entirely separate and opposing systems for the determination of controversies should be permitted to exist. And in many cases it is impossible for any man to say why one should be tried in the law court and the other in a court of equity. It often happens that there is but one principal fact to be determined. That found, the judgment of the law follows as a necessary consequence. If the case is tried in a court of law, twelve men strangers to the law and its procedure, and to each other, some uneducated and all unaccustomed to the business of weighing testimony, assemble together and they are called "the jury." In the trial which follows nothing is allowed to go to them which the opposing lawyers think would hurt their side, without a struggle, and many facts and circumstances by the rules of evidence are excluded altogether. The testimony is closed and submitted, after argument, to the jury for decision. In case these twelve men are able to agree, that decision is final and conclusive not only in the trial court but in the supreme court to which it may be taken for review. The circuit judge and the supreme court judges are bound by this finding of fact and the only thing for them to do is to determine whether any mistakes of law were made in the steps taken to determine the question of fact. But if the case is tried in the equity side of the court the jury is not called and the same judge who was incompetent to determine the fact the day before, alone and unaided hears not only the evidence which would have been allowed to go to the jury but everything connected with the case, which either side desires to put in. It is true that he is not supposed to pass upon incompetent testimony but the fact is, it is in the case and I doubt not is often, perhaps unconsciously considered, in its determination. The case may then be appealed to the supreme court and simply because it is

called by another name, the entire record, embracing all the testimony given on the trial, may be taken up and the supreme court which could not pass upon one fact in the law case is now authorized to pass upon the testimony and determine the facts for themselves and enter a decree in accordance therewith, and thus end the controversy. While in the case at law if legal error has been found in the record, the case is sent back to the trial court and there the case must be tried *de novo*. As I have seen the solemn judgments of our *nisi prius* courts set aside by the supreme court, judgments obtained in many cases only after years of controversy and after the expenditure of thousands of dollars, and have seen the parties obliged to commence at the beginning and go over the whole field of battle again, I have thought it was as if a party of men had made up their minds to make the ascent of some lofty mountain peak, and after days of struggle in making the ascent, at last, footsore, and well nigh exhausted, they arrive at the mountain top and then, at once, while they are congratulating themselves over the success of their undertaking they are calmly informed that every step of their progress up the mountain side has been noted and that at a certain point below they stumbled and fell, and because of that they could not remain and never could do so, until they could make the ascent from the base of the mountain without making a single mis-step. In case the attempt should be made again while it is quite certain that the party would not fall at the place where they did before, no assurance whatever could be given that they would not make a more serious mis-step at some other point of the ascent. And so it is altogether likely that they would abandon mountain climbing under such unfavorable conditions.

I do not desire to shock the conservatism of the profession by the advocacy of radical and what to some may seem utopian ideas.

But my position is this—that our controversies are now determined in a slow, expensive and unbusinesslike way; that our legal machine is sadly out of date and that a change of methods is imperatively demanded. If the controversy, once started, could be speedily settled, without much expense and with reasonable certainty, millions of dollars would be saved each year to our people and untold advantage would result therefrom. I think that this can be accomplished, but it will require work, and resort must be had to the surgeon's knife to cut out the useless growths, which now clog the system, but which are allowed to remain

through an unwillingness to submit to the operation. In this work, the great fact that the settlement of the controversy is the thing aimed at must ever be kept in view, and the machinery must be changed accordingly. Some laymen are unkind enough to say that they have always thought that the reverse was true and that delay and the prolongation of the controversy was the point aimed at. But such is not the intention, although such may be the fact. While the speedy settlement of the controversy is to be aimed at it must not be done at the expense of certainty and justice. I admit that right and truth should triumph, and that litigants would often be denied their legal rights if the controversy should be summarily decided without the right of appeal as the courts and legal machinery are now organized. But we can never be sure that exact justice will be obtained no matter how prolonged the controversy. Many cases end in the supreme court because they can be carried no further and not because the defeated party is persuaded that he is wrong. Under any system, the defeated party will be disappointed and the saying true—"The courts, when with us how wise, when against us, how other-wise." Such being the case, the litigants themselves, as well as the great body of the people who pay for the maintenance of the courts, would be benefitted by a speedy termination of their controversies. With power comes the sense of responsibility, and this leads to careful work. The reason why the workings of our justice courts are generally so unsatisfactory is this: There is but little power vested in these courts and therefore the people are indifferent as to who presides over them. Proceedings therein are often denominated legal farces and they are treated accordingly, parties often refusing to appear therein and contenting themselves with appealing from the judgment which they suffer to go against them by default.

How different would be the case if our people knew that within these courts the controversy, once started, must be forever settled. And I am of the opinion that such should be the case. It is true that the legal importance of a suit cannot always be determined by the amount involved and that it often happens that a suit where only a nominal sum is involved is of the greatest importance by reason of the questions of law arising on the facts or because of other questions depending upon the result. Provision should and can easily be made for such cases. But the truth is that such cases form an exception to the rule and that the

great majority of suits tried in justice courts are of the most trivial character. These cases should be tried and ended in the court in which they originate. Therein a *peaceable* settlement of the dispute can be made and if it is to be *final* the people will see to it that it is made by an honest and intelligent magistrate. If, in a case involving but a few dollars, the defeated party prevails on his appeal to the circuit, what does it profit him? The expense of the litigation and the time spent amount to much more than the sum recovered. So on the score of money, he is a loser, and his satisfaction will hardly compensate the people for the large expense they have been put to in his litigation. In cities, justices of the peace should be paid a salary sufficiently large to obtain the services of thoroughly competent men and their judgment should be final in all cases, except in special cases in which an appeal should be allowed to the circuit. What a relief to the higher courts would be effected at once!

Then let the distinction between law and equity be abolished and all the ancient and, in my opinion, useless forms of actions go with it.

Then we shall have one court, one judge and one form of civil action in which, if necessary, both legal and equitable relief may be demanded. I would have the same principles and substantially the same practice which now prevails in the equity court, apply to every civil action at law. The judge now finds the facts in all equity cases and in all non-jury cases. Why not go one step further and give him the power to decide all cases of fact? In case a jury is desired, let them have the same power and exercise the same functions that they have for years in the court of chancery. Let them hear the evidence, report over their signatures their findings of fact and submit the same to the judge who may give as much weight to them as he sees fit. But one court shall find the facts and render the judgment of the law thereon. Then, if there is enough involved to warrant it, let the case be taken to the supreme court as is now done in chancery cases, with every effort made to reduce the size of the record by leaving out all matter that is not absolutely necessary to a complete understanding of the case. Let the case be fully considered there and the decision reached be final. Except in special cases the case might be remanded for the taking of testimony on some point before the order was made.

Of course, I cannot in the limits of one article, cover every

point and answer every objection that may be made. I could not do so in many articles. All that I am sure of is this: Our present procedure can be greatly improved and that we should do in this state as has been done in many other states, viz: commit this entire subject to a commission of learned lawyers, *in sympathy* with this great work of reform in legal procedure and have them, after months of patient labor, report the results reached, to the next legislature of this state.

This is a matter of the greatest importance, in which every person in the state should be interested, and sooner or later, after passing through the period of opposition which every reform encounters, our legal machinery will be simplified and made to harmonize with the age in which we live.

UNIFORM STATE LAWS.

SULLIVAN M. CUTCHEON.

Through the efforts of the New England Divorce Reform League, afterwards re-organized as the National Divorce Reform League, a memorial, signed by governors, judges and other influential citizens, was sent to the United States congress, in January, 1884, as follows:

“The memorial of the undersigned citizens of the United States, respectfully shows:

That the wide difference between the laws of the several states as to the causes of divorce and the jurisdiction of their courts over suits of divorce by or against non-residents constitute an acknowledged element of confusion and uncertainty in American jurisprudence;

That these differences have led to many and distressing conflicts of judicial decisions in cases turning upon the degree of faith and credit to be given to decrees of divorce under the constitution and laws of the United States, or the comity of nations, so that a marriage is often treated at the same time in one state as dissolved and in another state or country as subsisting, and a man be convicted of bigamy or adultery in one jurisdiction upon what would be a lawful second marriage in another;

That the ever-growing number of foreign immigrants who become American citizens, and thus subject marriages contracted abroad to the jurisdiction of our courts of divorce, or by a temporary return to their original domicile may submit American divorces to the test of examination by foreign tribunals, make these matters a not infrequent cause of collision in the administration of private international law;

That the magnitude of these evils, their bearing upon our general social conditions, and the best methods of guarding against their increase can be fully apprehended only by a careful collection and comparison of the facts and statistics of divorce;

And that no attempt to obtain such statistics can hope for any considerable success unless it is made by the authority of the United States.

Your memorialists, therefore, pray that such a law may be passed as will provide for a thorough inquiry into the various matters referred to, and the collection of statistics of divorce from the records and authorities of the several states as a basis for future legislation."

In response to this memorial, congress passed an act approved March 3, 1887, authorizing the collection and compilation of statistics on marriage and divorce. The work was committed to the department of labor, and was admirably and exhaustively done under the guidance and supervision of Hon. Carroll D. Wright, United States Commissioner of Labor. The result was published in a volume entitled, "Report on Marriage and Divorce in the United States and Europe," which Prof. Peabody, of Harvard University pronounces "The most important contribution to our social philosophy which this country has yet produced."

The agitation of the question of greater uniformity of state laws upon marriage and divorce, led to a more general discussion of the need of uniformity on many subjects common to all the states but not within federal jurisdiction. The matter was urged upon the attention of the legislature of New York by the governor of that state in his annual message of 1889, and again in 1890, when Governor Hill said, "Under existing laws and decisions very different rules prevail as to what constitutes marriage; and while a certain divorced person may legally marry in some states, to do so in others, perhaps adjoining, would be a crime, even though no criminal intent existed. Such anomalies ought not to exist. In order to obtain, as far as practicable, the end desired, it is necessary to secure a voluntary concert of action among the states. It is suggested therefore, that some motion be made at this session toward a conference of representatives of all the states, or of such as may choose to be represented, to consider the question of uniform marriage and divorce laws." The legislature of New York, following out the suggestions of the governor, passed "An act to provide for the appointment of commissioners for the promotion of legislation in the United States," to be found in chap. 305 of the laws of 1890, the first section of which is as follows:

"Section 1. Within thirty days after the passage of this act, the governor shall appoint, by and with the consent of the senate, three commissioners who are hereby constituted a board of commissioners by the name and style of 'commissioners for the promotion of uniformity of legislation in the United States.' It shall be the

duty of said board to examine the subjects of marriage and divorce, insolvency, the form of notarial certificates and other subjects; to ascertain the best means to effect an assimilation and uniformity in the laws of the states, and especially to consider whether it would be wise and practicable for the state of New York to notify the other states of the union to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several states, and to devise and recommend such other course of action as shall best accomplish the purpose of this act."

Commissioners were appointed and at once addressed themselves to the work of the commission. They prepared and sent to the governors of the other states a communication beginning with these words: "The question of uniform legislation is attracting attention throughout the country, especially with regard to marriage and divorce, wills, descent, and distribution of property, forms of deeds, acknowledgments and kindred topics," and suggested the propriety of calling attention of the legislature to the matter. Replies were received from the governors of many of the states, cordially endorsing the movement.

The governor of Delaware, in his message to the legislature of that state, said: "The spirit of comity that should prevail between the states of the union, induces me to call attention to certain communications lately received by me from the commission to promote uniformity of legislation throughout the union upon the important subject of marriage and divorce. Under the present arrangement of the constitution, no federal cognizance or control over these subjects exists, and consequently a distressing absence of harmony in the legislation and judicial action of the several states exist, to the great injury of the family tie, the uncertainty of moral obligations, the legitimacy of children and the rights of property. By co-operation and co-ordinate legislation of the respective states a legal status could be agreed upon by all, which would enable great and valuable reforms to be accomplished. I therefore commend the subject to favorable consideration on the part of the legislature."

The American Bar Association has taken an active interest in the reform. A special committee appointed to investigate and report, sent a circular letter, containing a list of questions upon the subject matter, to leading lawyers throughout the United States. Their second question was:

"2. In what respect, if any, in your judgment, is a greater uniformity of the laws of the various states and territories desirable?

(a) Marriage. (b) Divorce. (c) Jurisdiction in divorce cases. (d) Residence in same. (e) Descent. (f) Distribution. (g) Wills. (h) Probate. (i) Insolvency. (j) Notarial certificates. (k) Commercial paper. (l) Acknowledgment of deeds."

In their report which was adopted by the association at its annual meeting, August 28, 1891, they say, "The answers to the second inquiry in the circular show an almost unanimous verdict in favor of greater uniformity on all the subjects designated, and a substantial agreement of opinion that the desired uniformity can be best secured by legislative action in the various states." They further say, "The annoyance arising from variant and conflicting laws seemed common to all the states, viz: perplexity, uncertainty, confusion, with consequent waste; a tendency to hinder freedom of trade, and to occasion unnecessary insecurity in contracts, resulting in needless litigation and miscarriage of justice." As the answer of Mr. Colby of New Hampshire, tersely puts it, "The continuing diversity of the laws of the various states and territories upon the subjects in question, causes constant and gross waste of capital by suitors, and of skilled labor by bench and bar; occasions long delays which are substantial denials of justice; facilitates various admitted immoralities and issues in uncertainty of law, which Burke aptly describes as 'the essence of tyranny.'"

After listening to the report, the association adopted the following resolution:

"Resolved, That this association recommends the passage by each state and by congress for the territories and the District of Columbia of an act similar to the acts passed by the states of New York, Pennsylvania, Massachusetts, Michigan, New Jersey and Delaware for the promotion of uniform state laws, and pledges its officers and members to a hearty co-operation, both in the creation and work of the commissions appointed."

The National Divorce Reform League, through its able secretary, Samuel W. Dike, LL. D., has from the first done all in its power to promote uniformity of state laws upon the subjects in which that organization is particularly interested, and much credit is due to that society for the progress already made.

The New York Commission, the American Bar Association

and the National Divorce Reform League have acted in perfect harmony in the matter, and their efforts have resulted, so far, in the appointment of commissioners by the states of Delaware, Georgia, Massachusetts, Michigan, Mississippi, New Jersey, New York and Pennsylvania. The laws of the several states, defining the duties of the commissioners, follow very closely the language of the New York statute quoted above.

This, in a general way, is the genesis of a juristic movement, the most important, in some respects, since the formation of the federal constitution.

The first meeting of the commissioners for the promotion of uniformity of state laws, was held at Saratoga Springs, August 24, 1892. At this conference, all the states which had appointed commissioners, except Mississippi, were represented. After several sessions at Saratoga Springs, the conference adjourned to meet at the rooms of the Bar Association of New York, on the 15th day of November, 1892. The commissioners from the outset manifested a hearty sympathy with the objects of the conference, and a willingness to make all necessary concessions from one state to another to enable them to reach a harmonious conclusion. It was deemed best to move slowly and cautiously in a matter of so great moment, until a larger number of states should be represented in the conference. It was decided, however, to consider and report upon such measures as would be most likely to secure favorable action by the several states. The final conclusion in each case was reached with great unanimity.

The conference formulated bills upon the following subjects:

1. Relating to acknowledgments of written instruments.
2. Relating to sealing and attestation of deeds and other written instruments.
3. Relating to the execution of wills.
4. Relative to probate, in this state, of foreign wills.
5. As to promissory notes, checks, drafts and bills of exchange.
6. As to weights and measures.

The principal advantage which would arise from the adoption of some of these acts, would accrue from the very fact of uniformity itself. The existing laws in many of the states as to some of the matters, are just as good as those proposed by the conference, but the diversity of such laws in the several states is inconvenient, and sometimes defeats the intention of parties. If these

proposed acts should be compared with the statutes of Michigan, it would be found that the first is in all material respects like the Michigan law.

The second provides that "No attesting witness shall be necessary for the execution of any deed or other written instrument conveying lands or any interest therein, provided the same be duly acknowledged, but, in case the same has not been acknowledged, one attesting witness to such instrument shall be sufficient for the validity thereof and for proving the same for record." That provision is in harmony with the statutes of a majority of the states.

The act relative to the probate of foreign wills, provides, "That any will duly admitted to probate without this state, and in the place of the testator's domicile, may be duly admitted to probate and recorded in this state by duly filing an exemplified copy of said will and other record admitting the same to probate, and such will shall then have the same force and effect as if originally proved and allowed in this state." The last clause, if adopted, would change the law of Michigan. The commissioners thought that when a will had been duly probated at the place of testator's domicile, it should not be subject to contest in each state where the testator might happen to own property at the time of his decease.

The proposed bill as to promissory notes, abolished "days of grace," and makes paper falling due on Sunday or any legal holiday, payable on the secular or business day next succeeding such Sunday or holiday.

The conference, by resolution, made certain recommendations as to the laws of marriage and divorce. As to marriage, they recommend, "that legislation be adopted requiring some ceremony or formality, or written evidence signed by the parties and attested by one or more witnesses, in all marriages, provided, however, that in all states where the so-called common law of marriage, or marriage without ceremony, is now recognized as valid, no such marriage hereafter contracted shall be valid, unless evidenced by a writing signed in duplicate by the parties and attested by at least two witnesses." Also that it shall be the duty of the magistrate or clergyman solemnizing the marriage, to file and record the certificate of such marriage in the appropriate or public office. That in case of common law marriage, so called, evidenced in writing as above provided, it shall be the duty of the

parties to such marriage to file or cause to be filed such written evidence of their marriage in an appropriate public office within ninety days after such marriage shall have taken place, and that a failure so to do shall be a misdemeanor. That in case the certificate last mentioned be not filed as aforesaid, or if no subsequent ratification by both parties, evidenced as aforesaid by a like writing, be filed, then neither party shall have any right or interest in the property of the other.

The age of consent to marriage, varies greatly in the several states. The rule in Massachusetts is fourteen in the male and twelve in the female. It was unanimously resolved that the age of consent should be raised in all states to eighteen in the male and sixteen in the female.

As to divorce, it was the sense of the conference that no judgment or decree of divorce should be granted, unless the defendant be domiciled within the state in which the action is brought, or shall have been domiciled therein at the time the cause of action arose, or unless the defendant shall have been personally served with a process within said state, or shall have voluntarily appeared in such action or proceeding. The commissioners did not deem it wise to make any recommendations at present as to causes for divorce.

If the legislation recommended by the conference should be adopted by all the states it would be a great step in advance, add materially to the convenience of inter-state business, and remove "a very serious impediment to the prosperity of the country."

In the language of the report of the Michigan commissioners to the legislature, "Every thoughtful man who has given attention to the matter, recognizes the need of greater uniformity of state legislation upon many subjects not within federal jurisdiction. Testamentary devices good in one state are void in another; deeds executed according to the laws of one state are inoperative in another; marriage valid in one state is unlawful co-habitation in another; children born in lawful wedlock in one state, are illegitimate in another, by reason of the unfortunate diversity of laws in the several states. Commerce and business are handicapped, and justice sometimes defeated, by the mere fact of this diversity of laws."

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BICYCLE riders in England evidently have not secured the sympathy of the courts to any marked degree. In *Ritchie v. Dav-entport*, recently tried before the Salford county court, the plaintiff sought to recover damages for injuries received from a collision with a cart which defendant had left in the road. It was half-past eleven at night when the accident occurred; but nevertheless Judge Heywood held that the wheelman ought to have seen the cart in time to avoid it, and returned a verdict for the defendant.

AN interesting question upon the construction of wills was presented to an English court in *Hancock v. Mellor* (Chancery Div., Jan. 19). A testator by his will devised and bequeathed the residue of his real and personal estate to several persons named as residuary legatees. Subsequently by a codicil to his will he directed that one of the persons named should be "excluded from any interest in my residuary estate." The question arose whether by reason of the exclusion by the codicil the share of the person excluded fell into the residue, and became divisible between the other persons named in equal shares, or whether this share lapsed and passed to the heirs-at-law and next-of-kin of the testator. Mr. Justice Kekewick entertained the latter view, and held that the share did not become divisible between the remaining residuary legatees but lapsed.

ACCORDING to public acts, 1881, No. 150 (How. Stat., sec. 978), contributory members of state military companies, on payment of ten dollars as annual dues to such companies, are exempt from poll tax and jury duty. A movement has been started by

the Houghton County bar, through Richard T. Looney, a member of the bar, having for its object the repeal of this law. By means of an open communication to Carlos D. Sheldon, representative in the legislature from Houghton County, Mr. Looney gives as reasons for the repeal the following: That it is contrary to the fundamental principles of the American jury system; that juries should be summoned from all classes, without regard to their financial standing; that this law weakens the judicial system of the state for the purpose of building up the military power; that it allows those to escape from jury duties who are the best fitted to perform those duties; that it compels mechanics and laborers to do more than their just share of jury duty; that the evidence is, that because of this law business men almost entirely escape jury duty; and finally that the state of Michigan is rich enough to support its military forces without infringing on the domain of the judiciary to do so.

This matter would have been brought before the Michigan State Bar Association by the Houghton County bar, if the opportunity had presented itself before the adjournment of the legislature. Judge Stone of the Marquette circuit and Judge Hare of the Gogebic and Houghton circuits are quoted in favor of the repeal, and they are backed by the almost unanimous bar of that section.

THE law school of the Western Reserve University, located at Cleveland, Ohio, has recently received the sum of \$50,000 as an endowment fund. The gift comes from Mrs. Lucy M. Backus, the wife of the late Franklin T. Backus, an eminent member of the Cleveland bar, and is given as a memorial of her husband. The law school will hereafter be known as the "Franklin Thomas Backus Law School of Western Reserve University." Every time we hear of one of these donations to law schools, we wonder when the law school of the University of Michigan will be struck by the same kind of lightning. Like the rest of the University, the law school stands in need of financial assistance. The marvelous growth of the school rendered the construction of an addition to the old building imperative. The legislature recognized the necessity and an addition was built. But even with the enlarged accommodations, the law school is somewhat embarrassed. There are still a number of directions in which the work of the school can be developed, but the authorities are hampered for want of funds. But the other departments of the University are more in need of financial assistance just now, and the legislature will relieve them before it again turns its attention to the law school. There is a larger number of graduates of the law department than of the literary department or of any other department. Many of them have accumulated fortunes in the practice of the law and have built up magnificent libraries, yet we never hear of the law school

being the recipient of any donations, while the more fortunate smaller schools of the states to the east of us are being favored by their alumni. Out of the 4,500 graduates of the law department of the University of Michigan, as far as our knowledge extends, not a single one has added to the library of the law school. The Buhl collection, presented by one not a graduate of the University, is the only benefaction of any consequence which the law school has been fortunate enough to receive.

THERE is no doubt but that the spirit of legal reform is taking root in Michigan. Since the organization of the Michigan State Bar Association the lawyers of the state have been awakening to a conception of the needs of reform in the legal procedure in our courts. The association has justified its existence on that score if on no other. The legislature has caught the spirit of the state bar, and a joint resolution has been introduced by Senator Barnard of Grand Rapids, providing for the appointment of three commissioners to examine into and report plans for the reform of legal procedure. The editors of the MICHIGAN LAW JOURNAL have taken every opportunity to express themselves heartily in favor of any and every movement which has for its object the reform of legal procedure, the abolition of useless legal machinery, and the codification of laws. In this number there are published articles upon the general subject of law reform, contributed by two of the most distinguished lawyers of the state. Mr. Fred A. Maynard is a leading member of the bar of Grand Rapids. His contribution, "Reform in Legal Procedure," is a courageous and fearless attack upon the antiquated features of our present system of legal procedure. His remarks are pungent, and he "strikes straight from the shoulder" in every sentence. His words cannot fail to have their effect. "Uniform State Laws" is the first consecutive statement of the progress toward uniformity of law in this country that has yet been made. The writer, Hon. Sullivan M. Cutcheon, needs no introduction to the lawyers of Michigan. He is the president of the "Board of Commissioners for the Promotion of Uniformity of Legislation in the United States" for the state of Michigan. The other Michigan commissioners are C. W. Casgrain of Detroit, secretary and A. C. Maxwell of Bay City. The report of the commissioners, with bills formulated to carry out their recommendations, has been prepared and forwarded to the legislature. A very intelligent idea of the progress of the state boards of commissioners can be gained from Mr. Cutcheon's succinct statement. Michigan should take great pride in the fact that she is among the very first to encourage the movement for uniform state laws, and particularly in the fact that her representatives have been so active and have done so much effective work. Delaware, Georgia, Massachusetts, Michigan, Mississippi, New Jersey, New York and Pennsylvania are the only states which

have appointed commissioners but the remainder will "fall in line" when it is demonstrated, as Mr. Cutcheon's article most certainly does, that the movement is gaining strength and will be productive of beneficial results.

CODIFICATION.—Two-thirds of the states of the union have codified their laws; that is, they have written down, in systematic form, the principles of law which exist as traditions in the reports. Sooner or later the question, whether here in Michigan we will fall in line with the other code states, or whether we will shut our eyes against any proposed change, whatever benefits it may promise, and continue to cling to the common law, will again face the people of this state; for it cannot be contended that the question of the adoption of a code has ever been fairly and fully presented. The significance of this move they do not in the least comprehend.

At most, the question is simply one between written and unwritten law. Strange that in this country, where reverence for the only written document, the constitution, has grown into an almost dangerous worship, we should fear to reduce our other laws, those which affect us more vitally, to writing. It may be contended, and Frederic R. Coudert does contend, in the February *North American Review*, that there is no analogy between the constitution and other written codes. In his own words: "The constitution of the United States may not be likened to a code of laws," because, says he, "our constitution was and is but a *treaty* between several sovereign states. * * * As a treaty intended to regulate the relations of sovereign states, it is plain that its provisions must be reduced to writing." He not only concedes the advantages of this written instrument over an unwritten constitution, but the advantages resulting have been so marked that he concludes "It must be reduced to writing." Whether he accounts correctly or not for the facts as they exist, does not disturb the facts themselves. Mr. Coudert does not attempt to gainsay the fact that the nation has progressed under a constitutional code, as it could not have done otherwise, but he refuses to generalize, or admit, that codification of other laws would be beneficial on the ground that the constitution differs from other codes, in that it is a *treaty*. If after a sufficient trial, when circumstances were most trying, we feel that a written constitution is not only better for us, but the very best, and then disprove the theory which he assumes may make a difference between our constitution and a code of laws, will we not be warranted in claiming for a written code all the advantages which even this writer admits have flowed from a written constitution? We should hesitate to criticise a writer who speaks from the *North American Review*, were he not directly opposed to the highest authorities we have on these subjects. That the constitution is not a treaty is

held by a long line of supreme court decisions, and these decisions have back of them the emphasis of the civil war. This to the profession is elementary, and the non-professional reader may verify, if he will take the trouble to study the case of *Rhode Island v. Mass.*, Peters' Reports, vol. 12; or *Gibbons v. Ogden*, 21 Howard, 506, wherein our highest tribunal expressly says, "The constitution is not a league, or treaty." Since Calhoun and his coadjutors, this is the first assertion of that dogma, and its reappearance seems more ridiculous than serious. If the constitution is but a treaty between sovereign states there will be a difference between it and a code. However, the constitution is not only analogous to a code; it is of itself a code, purely and simply. Prof. Pomeroy, sec. 16, in his work on constitutional law, says; "The constitution "is indeed, in all respects a statute, a statute of vast and solemn import, * * but it is none the less a statute—an expression of legislative will in written form." and on the same page, "In short, the constitution is a written code, creating functions as far as they go."

In no state where the code has been tried has it been cast aside. The experience in New York has been the least favorable of all the states, but here no desire has been seriously shown to revert to the old system. The difficulty in New York can be explained without any reflection upon the code system. She had no precedent to follow, as hers was the first attempt ever made to codify the common law; moreover, the innumerable amendments and changes, wrought by the most corrupt politicians in the United States, have well nigh wrecked all law. The bill recently introduced into the New York assembly proposing to license as an attorney every person who has served seven years in the legislature, and which would if passed make court officers of the worst political bosses in the most corrupt state of the union, is a sample. A vast amount of such legislation as that, has impaired, but not destroyed, the efficiency of the code in that state. Fairness would suggest, however, that we select some other state as a criterion, and what other state we take makes but little difference, for elsewhere no apology need be offered for the way the code works. Mr. Coudert, writing from New York state, even if he explained facts by other than exploded theories, should not receive the same attention as a writer from Connecticut or California. To rightly obey, we should understand the rule. Whatever is written we can read and understand. If it be desirable to keep the mass of the people ignorant of the laws, for disobeying which they are punished, then the common law system is *par excellence*. Caligula hung his decrees too high for the people to read. Our common law system, which buries its maxims behind innumerable reports, so that none but experts can exhume them, does no more than did the Roman tyrant. The Hebrew laws were written, and daily read to those who were expected to observe

them. All Europe, save only England, lives under written codes. Surely we in Michigan do not lack successful precedents. When the code proves a failure, for the first time, then other arguments than example may be demanded. Under a well organized code our judges would have time to study the equities of a case, and to apply rules known and certain, instead of being compelled to spend the greater portion of their time endeavoring to discover the rule.

THE MICHIGAN BAR HONORED.—In calling Mr. Henry T. Thurber of the Detroit bar to the position of private secretary, Mr. Cleveland has made an appointment of peculiar excellence. Henry Thomas Thurber is a native of Michigan. Though still on the sunny side of forty, he has done more before middle age than is given to most lawyers to accomplish in a lifetime. He was born in Monroe in 1854 and was graduated from the literary department of our University in the class of 1874 with the degree of A. B. In 1875 he entered upon the study of the law in Detroit in the office of Moore and Griffin, and pursued his studies with Griffin and Dickinson after the dissolution of the former firm. He applied himself with energy and assiduity to the work before him, and was admitted to the bar in 1877, and 'ere long was received into partnership by his employers. He continued in partnership with Mr. Dickinson after the retirement of Mr. Griffin, and this relation has subsisted to this date, the present firm being Dickinson, Thurber and Stevenson. Mr. Thurber married, in 1880, Miss Elizabeth Brady Croul, and has a family of three children.

To many of the profession, Mr. Thurber is not so well known as to the business world. In the division of labor he has turned his attention to the commercial side of a law practice, and if he has not acquired equal fame in court circles it is, because the press of business matters has left him no time for the trial of causes. With a fine executive capacity, he has instinctively recognized that which he might with profit delegate to others, and to which he must give his personal attentions. He has been content to leave forensic honors to those not so gifted as himself in the line of his specialty. It goes without saying that his efforts have brought him wealth, and so large and so lucrative a practice that it has occasioned surprise that he should leave it.

Though no politician in the ordinary acceptation of the term, though never seeking political preferment, he has always manifested a keen interest in politics, in its best sense. Though without political experience, the ripe judgment and habit of patient and unceasing industry formed by the years past will enable him to cope successfully with his new and difficult task. He has a sufficient sense of duty to make him devoted to the President, and quite sufficient knowledge of human nature and the world to make that devotion useful. A man of perfect command of himself, of

quick decision and self-reliance, daunted by nothing, of undoubted talent and what is perhaps better, infinite tact, Mr. Thurber will bring to this office those qualities which will ensure a proper performance of all the varied duties of the post.

His genial disposition, his unvarying courtesy and his strong sense of humor will win him friends in every class or station in life, and it is to be feared that wider opportunities may be offered to him after the Cleveland term has closed than Michigan affords, and we shall be compelled to lose him from our midst when he finds it to his advantage to make his home elsewhere. Mr. Cleveland is to be congratulated upon his choice.

George S. Hosmer.

MONTHLY RECORD OF SUPREME COURT DECISIONS.*

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* Copies of the opinions of the supreme court may be obtained, upon application, from Charles C. Hopkins, clerk of the supreme court, Lansing, Mich.

out of his jurisdiction. *Toliver v. Brownell*. Grant, J. Certiorari to justice of peace. Reversed.

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WILLS—Construction of devise in, whether conveyance in fee, charged with a trust, or a life estate—Admissibility of parol extrinsic evidence to prove intention of testator—Process, how must be tested. *Forbes v. Darling*. McGrath, J. Appeal from Newaygo. Reversed without prejudice.

NOTES OF RECENT MICHIGAN DECISIONS.

FALSE REPRESENTATIONS, AND "CAVEAT EMPTOR."—The plaintiff in *Maxted v. Fowler*, (Montgomery, J.), by representations that certain mining stock was selling for \$1.00 per share and that he would in a short time make it worth \$2.00 per share (plaintiff stating that he was entirely unfamiliar with the value of mining stocks and relied upon his statements) was induced to exchange certain property valued at \$1,800, for \$1,300 in stock and \$500 in cash. The court held that where the defendant knows that the plaintiff is wholly ignorant of the value of the property, and knows that he is relying upon the defendant's representation, and such representation does not take the form of a mere expression of opinion, and is in the nature of a statement of fact, the rule of *caveat emptor* does not necessarily apply. *Picard v. McCormick*, 11 Mich., 68; *Manning v. Albee*, 11 Allen, 520; *Lawton v. Kittredge*, 30 N. H., 500; *Bradley v. Poole*, 98 Mass., 169; *Miller v. Barber*, 66 N. Y., 558; *Gerhard v. Bates*, 20 Eng. L. & E., 129.

WAIVER OF RIGHT TO MECHANIC'S LIEN.—In *Blakely v. Moshier, et al.*, (Durand, J.), the defendants bought from a third party a certain house in the construction of which materials were used which were purchased from complainant by said third party, the builder. Complainant seeks to enforce a mechanic's lien after such purchase, under the following circumstances: The defendants in this cause bought the house when there were no liens of record against it. The complainant took a note from said third party in payment of the materials which entered into the construction of the house. The note would not fall due until twenty days after the time had expired, under the lien statute of 1885, for filing a claim of lien. A claim for a mechanic's lien was filed only a short time before the commencement of this suit, and several months after the expiration of the statutory time for filing such claim. The court held that the acceptance of the note under such circumstances was a waiver of the right to file claim of mechanic's lien, and a lien once waived cannot be renewed. *Au Sable River Boom Co. v. Sanborn*, 36 Mich., 358.

APPLICATION OF THE STATUTE OF LIMITATIONS TO ACTIONS BROUGHT BY INFANTS.—This question was very thoroughly discussed in *Keating v. M. C. R. R. Co.* (Long, J.) Plaintiff's action was for injuries received in 1876, when he was seven years old. Two previous actions had been brought by his father as next friend; one in 1877 and another in 1883. Both were discontinued, the latter in 1890. The present suit was brought within one year after plaintiff became of age. Defendants pleaded the statute of limitations, contending that the term "disability" used in the statute means the disability to bring suit, and that when the right to bring suit begins the disability is removed; that the disability was removed by the appointment of the guardian, and the statute consequently began to run from the time of the appointment of guardian, or at any rate from time suit was commenced by him. This theory the court refuse to accept. They hold that the disability is not removed until he attains his majority,

and that the commencing of suit in the name of the infant by his next friend, did not set the statute in motion so that any lapse of time would bar it short of the time fixed by the statute, which is six years after his majority.

RIGHT OF ACCUSED TO CHOICE OF MODE OF TRIAL IN JUSTICES' COURTS.

—While the circuit court may order a jury in civil cases, though no jury be demanded, yet no such authority is conferred upon a justice of the peace neither in civil nor criminal cases. It is error for a justice to order a jury against the protest of the accused, who has waived trial by jury and demanded a trial by the court without a jury. *People v. Steele*. (Grant, J.)

VEXATIOUS APPEALS.—The supreme court are doing a praiseworthy thing in discouraging the carrying of trivial matters to the higher court upon flimsy grounds. In *Dammon v. DeBarr* the practice was severely criticised, and in *Erickson v. Drazowski*, a case in which the decision of the lower court was obviously just, and in accord with the well settled rules of law, the court in affirming the judgment added, "and for vexatious appeal plaintiff will be entitled to the sum of twenty-five dollars."

CONSTRUCTION OF DEVISE IN WILL—ADMISSIBILITY OF PAROL EXTRINSIC EVIDENCE—TESTING OF PROCESS IN CHANCERY.—Several interesting questions were presented in *Forbes v. Darling*, (Feb. 3, McGrath, J.) A testator gave, devised and bequeathed to his wife all his real and personal estate, making her sole executrix, and directing her to pay all debts, etc., and to keep and use the residue of the estate for the support and maintenance of herself and family, and the education of their children. He also committed unto her the guardianship of their children, the expense of their maintenance and education, until they attained the age of 21 years, to be borne by the widow out of the moneys and estate given her in the will. The widow died nineteen years later, when all but one of the children had attained their majority. In her lifetime she had executed a mortgage upon the real estate devised, proceedings to foreclose which had been commenced prior to her death. The heirs sought to have the foreclosure proceedings enjoined, and the mortgage declared null and void, contending that the widow took but a life estate under the will. This contention the court refused to sustain, holding that the instrument conveyed an estate in fee, and that the widow took the beneficial interest charged with a trust.

The complainants sought to show a different intention on the part of the testator by conversations had with the person who drew the instrument, and with others after its execution. This was held inadmissible. There being no ambiguity on the face of the instrument, extrinsic evidence was not admissible to show an intent other than that expressed.

The subpoena issued in the foreclosure proceedings was not styled "In the name of the People of the State of Michigan," as provided by Sec. 35, of Art. 6 of the constitution, and How. Stat., § 7290. The caption of the process runs as follows: "State of Michigan. The Circuit Court for the County of Newaygo, in Chancery. To Fraucina Forbes, greeting." This was held not even a substantial compliance with the provisions of the constitution. The requirement being constitutional the defect was jurisdictional, and the defendants were enjoined from proceeding to sale under the decree for foreclosure, without prejudice however to any subsequent proceeding to foreclose the mortgage.

CORRESPONDENCE.

CHANCERY JURISDICTION.

To the Editors of the Michigan Law Journal:

I submit the following question for answer in the LAW JOURNAL: Will a chancery court in this state have jurisdiction when a bill is filed in aid of execution to set aside fraudulent transfer of real estate of the value of \$800 which alleges a judgment recovered in justice court for \$75, exclusive of costs and transcript duly filed with circuit court clerk, execution issued and levy made?
LAWYER.

NON-PARTISAN JUDICIARY.

To the Editors of the Michigan Law Journal:

That it is best for the independence of the judiciary, the administration of the law, and the welfare of the people, to have the judiciary divorced from politics, is conceded by many lawyers who have given the subject unbiased consideration. But some have suggested that if judges were not chosen at regular elections and were appointed by the governor of the state, the judiciary would be divorced from politics. We believe it to be a matter of common observation and experience in the state, that the appointing power is usually exercised along political lines, and instances are not wanting where a bench of judges holding offices by appointment, has shown unmistakable political partisanship when occasion seemed to require it.

1. Each county in the state should send delegates in proportion to its population, some of whom should be laymen, and some of them lawyers, to a non-political convention to be held for the purpose of naming suitable candidates for the supreme bench.

2. At such convention there should be placed in nomination not less than two candidates for the supreme bench, and as many others as the convention should see fit to name for the place.

3. When these candidates are so named, an official list thereof should be certified under the hands of the chairman and secretary of that convention to the office of the secretary of state.

4. The secretary of state should prepare as many ballots as there are candidates so certified, of uniform size, color and shape, and with the name of one candidate printed upon each ballot.

5. The attorney-general of the state, the secretary of state and the auditor-general should be ex-officio, a committee to place said ballots in a suitable box to be provided by the state for their reception, and from which they should be drawn out in the manner hereinafter named.

6. Said ballot should be shaken up by one member of said committee before being drawn from the box.

7. On a day to be fixed by law, and at the capitol of the state, the governor thereof should, without being permitted to inspect the ballots nor to look upon them at the time of the drawing, publicly draw said ballots from the box, and the candidate named on the second ballot drawn

from the box, should be thereby deemed chosen as a judge of the supreme court.

8. A certificate should then be given to him by the governor and the committee attending the drawing, entitling him to hold the office for the period of at least two years.

While these outlines of the proposed plan are of necessity crude, and in a measure imperfect, does it not appear that by the adoption of such a plan, the following results will be obtained?

(a) A method whereby the elective and executive powers of the people through their convention and state officers, will be a unit for the selection of a judge.

(b) A system by which no man, combination of men, representing any political party, could in any manner wrongfully influence or control the selection of a judge.

(c) A system under which the judiciary would be entirely divorced from politics.

Lawyers, before you condemn this as a visionary scheme, give it thought.

W. D. T.

BOOK REVIEWS.

NICARAGUA CANAL.—Thesis, University of Strassburg, Germany. Dr. L. M. Keasbey, University of Colorado, Boulder, Col.

This thesis was, in view of its great merit, published by the University of Strassburg, Germany. Its author, Dr. Keasbey, is a young man, a graduate of Harvard, and subsequently a fellow in the Columbia Law School. After that he went abroad and took the degree of D. R. P., at Strassburg, one seldom granted and never as yet to an American. He is at present a professor of jurisprudence and political economy in the University of Colorado, located at Boulder. The thesis, which is written in the German language, is to be translated and issued as a university publication by Columbia College. The subject of the thesis is an interesting one just now, in view of the agitation of the Nicaragua Canal problem in the United States senate, and the Panama scandal in France. The pamphlet treats of the occupation and colonization of the country by the Spaniards, and this is followed by a history of the agitation that led to the canal project. The fight between Spain and England for the Nicaragua route, the relations of this country to the project are dwelt upon, and the topography of the country and the schemes for opening the canal are thoroughly treated. The thesis is a careful and thoughtful treatise, and the author deserves all the complimentary notices which it receives from the American press.

BROWNE ON PAROL EVIDENCE.—A Treatise on the Admissibility of Parol Evidence in respect to Written Instruments. By Irving Browne, Editor of the *Albany Law Journal* and the *American Reports*. New York: L. K. Strouse & Co.

The name of the gifted author of this work is so widely known among the profession throughout the country that the announcement of a legal work by him is sufficient to secure for it the careful perusal of all into whose hands it falls. It would be surprising if, somewhere between the covers of the volume, a little of the humor which seems naturally to find its way into all the author's writings, could not be noticed. We think we discover a tinge of it in the very first paragraph of the preface, where the author says that "the idea of writing such a work grew out of the costly suffering of one of the author's clients by reason of judicial ignorance of an exceedingly elementary doctrine of this branch of law." The author also says that the work has "grown up gradually from subsequent practical experience and from the editorial reading and research of the last fourteen years." The truth of this last statement is very patent. The reader is soon convinced that it is the work of one who has found it a pleasure to systematize the research of many years, rather than the product of one who has set himself to the task of writing a law-book.

It is unnecessary to state that "no attempt at a distinct, comprehensive and thorough treatment of the subject" has before been made. The practitioner with the most moderate practice has had occasion to note the want of such a work many times, and sought through several volumes of

text-books and reports for what he now has condensed into one book. It would take far more more space than we have to spare to notice the work as carefully and specifically as it should be. Every good lawyer knows what the book should contain. Suffice it to say that it is all here, and arranged and edited as only one with the legal and literary experience of the author is capable. It is well indexed, and has an admirable synopsis of contents. It is arranged in sections with attractive head lines which make it well adapted for a text-book. In fact, it meets the requirements of student, teacher and practitioner.

COBBEY ON CHATTEL MORTGAGES.—A Practical Treatise on the Law of Chattel Mortgages as Administered by the Courts of the United States. By J. E. Cobbe, of the Beatrice (Neb.) bar. St Paul: West Publishing Company.

Mr. Cobbe's excellent work on "Replevin" gained for him such a reputation that this later contribution to legal literature will be received with a careful consideration not usually accorded such a comparatively new law writer. A new work upon a subject which has several times been treated, to make it of special value should do at least one of two things: (1) add new and important matter, to be sifted from the ever accumulating mass of case law; (2) improve upon the arrangement of its predecessors. Mr. Cobbe has done both. This cannot be shown in fewer words than by reference to the chapter headings which we give below. The work is in two large volumes, containing nearly 1,500 pages. The appearance and general "make-up" is excellent. The index of one hundred pages is quite well constructed. It is evidently adapted for a working tool in the law office rather than a text-book for college use, on account of its size. But the student will find it pleasant and profitable reading, as it treats of a class of subjects with which he will have to deal as soon and as often as with any other. The following is the arrangement:

I. Introductory derivations and definitions.

II. Form.

III. Statutory provisions in regard to form and execution.

IV-IX. Construction—When a bill of sale and when a mortgage—When a pledge—When a conditional sale—When assignment for benefit of creditors—Other agreements, when considered mortgages.

X-XI. Consideration—A contingent liability as.

XII. Description of the thing mortgaged.

XIII-XVIII. What may be mortgaged—Fixtures—Merchandise with power of sale—Railroad property—Ships—Future-acquired property.

XIX-XX. Execution—Parties—Who may make, and who take.

XXI-XX. Effects of a mortgage—Rights of the parties—Effect as regards possession.

XXIV. Statutory provisions regarding filing, recording and renewing.

XXV. Filing, recording, renewing and notice or possession dispensing with the record.

XXVI. Sale of mortgaged property—Rights of purchaser and mortgagee.

XXVII. Assignment and transfer of the mortgage.

XXVIII. Effect of assignment and bankruptcy proceedings.

XXIX-XXX. Statutory provisions as to rights of attachment and execution creditors of the mortgage—Rights of attachment and execution creditors.

XXXI. Fraudulent and void mortgages.

XXXII. Criminal liability for disposing of mortgaged property.

XXXIII. Breach and default and taking possession for foreclosure.

XXXIV. Payment and tender of payment of the mortgage debt.

XXXV. Statutory provisions relative to foreclosure on mortgaged personal property.

XXXVI-XXXVIII. Foreclosure of the mortgagor's equity of redemption—Defenses—Redemption and damages arising out of defective foreclosure.

XXXIX. Second mortgages.

XL. Release and statutory penalty for failure to cancel a paid mortgage.

LAWSON ON CONTRACTS.—St. Louis: The F. H. Thomas Law Book Co.

This is the only text-book on contracts which presents a clear and concise statement of the principles of the law of contracts as contained in the decisions of our courts of last resort up to the present time. Story's work is now practically obsolete, and other American works partake of the nature of digests. Dr. Bishop presupposes a knowledge of contractual law, which the average practitioner does not possess. Succinctly, yet simply and comprehensively, Prof. Lawson discusses this, by far the most important branch of law, in a neat volume of 640 pages, which he divides into five parts, viz: the formation, operation, interpretation, discharge, and remedies upon, the contract.

THE AMERICAN CORPORATION LEGAL MANUAL.—Charles L. Borgmeyer, Editor. Plainfield, N. J.: Honeyman & Co.

This volume contains the essential features of the statutory law regulating the formation, management and dissolution of general business and insurance companies. The work is closely written, and covers 658 pages, and contains a synopsis of the laws of all the states and territories of the union, and of such states of Central and South America as have laws upon this subject. Not only this, but a synopsis of the law of patents, trade-marks, and copyright, is also included. The Michigan corporation law was compiled by Ralph Stone, one of the editors of the MICHIGAN LAW JOURNAL, and a member of the firm of Outcheon & Stone, of Grand Rapids. If the entire work is as authoritative as that for Michigan I cannot commend it too highly. At all events it is a timely compilation, and will supersede everything else on this subject.

E. R. S.

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*THE POWER TO AMEND THE FEDERAL CONSTITUTION.**

THOMAS M. COOLEY.

When that constitution of a state which we are accustomed to call an unwritten constitution is under consideration, we shall readily understand that it is one that from the very nature of things must from time to time be subject to change without the changes being formal and authoritatively declared. Such a constitution springs from the usages and customs of the people and of their government, and, though it may in part be expressed in important charters or writings, yet these are likely to be such as may not at first be regarded as fundamental and universally accepted as constituting a part of the constitution. What the constitution is may therefore as to some particulars, at any time in the history of the people, be the subject of controversy; one party or portion of the people contending that particular usages and customs are not yet accepted as fundamental, while another may contend the contrary. But however this may be, it is certain that in one age or century the constitution will be somewhat different from what it was in that which preceded. And taking the constitution of Great Britain as the leading one of this class, we might point out many striking illustrations of the fact stated. A constitution which is wholly in writing, if it is promulgated by a sovereign who is at the time accepted by the people as supreme ruler, unless it divests him altogether of the sovereign power he was supposed to hold before, and thus effects what in its nature is a revolution, must be subject to alteration at his pleasure,—the alteration being declared in writing as the original constitution was, unless in that

* What is here given was delivered as a lecture to the post graduate class in the University of Michigan, and taken down stenographically.

instrument some different method of change has been provided for. But when a sovereign people agree upon a constitution in writing, putting it in force at once as almost necessarily they must do, the method of subsequent change will be different.

First let us understand that such a constitution, when once put in writing and given effect, is one that must in meaning be always what it is at first. That is a point to be specially remembered and impressed upon the mind. The constitution, when expressed in writing and put in force by a people whose theory of government is that the sovereign power is in their hands, must stand always as written except as changes are made according to the method provided for by it. [There is no such thing as imperceptible change in such a constitution.] Doubtless all of you have heard the idea expressed that our constitution is something different today from what it was one hundred years ago, independent of the amendments expressly made. That is a very grave error. Emphatically, such a statement is not true. There has been occasion to apply the constitution to a great many new subjects, and in ways not contemplated perhaps by its authors, but [we must suppose that it has been applied exactly as it would have been one hundred years ago if those subjects had then come up for consideration, and if occasions for the application of the instrument to them which have since arisen had then existed.] The plain duty now of any person called upon to act, either officially or in his private capacity as a citizen, under any provision of the constitution, is to give effect to that provision as nearly as may be according to the meaning that belonged to it at the time it was first adopted, and if he shall be satisfied that departure has been had from this meaning in the administration of the government, he should do what may lie within his power to check the departure and make the instrument express its original intent. He is not fully loyal to the constitution if he fails to do so. We should never forget this:—The constitution stands as originally framed, and speaks its original language until it is changed in the manner provided for therein; it does not insensibly grow; it does not change with the ideas of the people unless they express those ideas in a constitutional and authoritative way.]

The preamble to the constitution mentions first of all among the reasons for establishing it, the purpose "to form a more perfect union." There was union before but never a nation, and when the convention met it was not yet even agreed that one should

be formed. The colonies had all been subject to the British crown, they united loosely to resist oppression, and to carry through to success the war of independence they established the articles of confederation, the leading purpose of which was to enable them to act together in their intercourse with the outside world and for their common defense, but in every step taken they had dealt with each other on a footing of equality and independence, and in the articles of confederation had taken the pains to declare, lest a different purpose might be inferred, that each state retained its sovereignty and independence. When therefore the convention met which framed the constitution, it was a convention which the delegates, in so far as they acted at all, would act for their several states only, and subject to approval or rejection by the people of their states acting severally and not together as an aggregate. The call of the convention indeed contemplated only amendments to the articles of confederation, and if nothing more had been attempted the state of things after completion and ratification of the work done, though we cannot of course now even surmise just what it would have been, would clearly have differed fundamentally from what it is now; but the majority of the convention saw very clearly that the time had come when if the benefits expected from the union formed by the articles of confederation were to be had, something more than amendment was necessary. It was first of all necessary that the states should concede something of their sovereignty, and create a common government for the exercise of such sovereign powers as would give that government a standing in the family of nations, and enable it to act for all in the most important matters which were of common concern at home. It was with that conviction that the convention, instead of undertaking to amend the articles of confederation for the independent states, proceeded to form a constitution that should, if adopted, create from those states a nation, and then to submit it for approval. A state is defined by Chief Justice Chase in *Texas v. White*, 7 Wallace, 721, as "a political community of free citizens occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." To the states thus defined the constitution was submitted, and in accepting it they speak as with common voice, but each for itself as "We, the people." Anticipating the possible rejection by some, it was agreed that, if nine accepted, the government should be organized,

the existing common tie with the others being in that event severed; a breaking up of the confederacy, not contemplated as possible at the time it was formed, but, nevertheless, within the competency of state sovereignty as then existing. Should the constitution be accepted by nine or more states the power of states subsequently to break up the union would be taken away, because the nation thereby formed would be clothed with self-perpetuating sovereign powers conferred by states which retained no power of withdrawal, and by a constitution which it was understood should stand forever. It is true that the inherent right of every people to overturn by revolution a government whose oppressions they have found to be unendurable was not questioned but universally conceded by the people; but the constitution was framed to render such oppressions impossible. Nothing but blessings were expected to flow from it. The power of government would in the main be left in the hands of the people, the rulers being selected at short intervals. The natural and inevitable tendency towards a concentration of power in the general government was not at first fully understood, yet as those who would administer that power would be directly responsible to the people, they would be promptly brought to the bar of public opinion and dealt with, if they should be thought to have exceeded their proper authority. Such was the thought underlying the constitution. And in this connection I call your attention to the fact that when the constitution was formed, or immediately after, certain amendments were proposed to that instrument that were adopted by the several states under circumstances which were considered as making them really, for all practical purposes, a part of the original instrument, and the main object of which was to put it beyond the power of the general government to oppress the people; to declare certain fundamental rights existing in each individual of the nation which should be beyond the reach of any one of the three departments of the government, and in which it should be the special duty of the judicial department of the government to protect him; amendments constituting together a sort of Magna Charta; a declaration of individual rights, so broad, so comprehensive, that, if enforced, would put it almost out of the power of any department or officer of the government seriously to oppress an individual. And restrictions, I may also remind you, were not found in the national constitution alone, but in every state there was something corresponding to

this Magna Charta, limiting the power of the state government for the protection of the people as individuals.

But as the future could not be fully foreseen, there was embodied in the constitution itself a provision for further amendments; amendments which might originate either in the congress or in the states, and when regularly proposed and acted upon by the states, three-fourths of the states concurring in them, should become a part of the constitution itself, And it was supposed that if any very serious evil in government should at any time in the future threaten or actually arise, it would as a matter of course be guarded against or cured in this way. It was supposed that by this method ample means were provided so that it should be beyond the power of the government, (which for the time being was nothing but an agency of the sovereign people, and not in itself possessing the sovereignty), to oppress the people to that point where they would feel called upon to resort to an attempt at revolution for the purpose of a redress of grievances. In this way therefore it was supposed that provision was made whereby this assumption in the constitution that it was to endure forever would be made reasonably certain of realization, since the constitution itself was capable of easy and peaceful modification to provide for all sorts of contingencies and to remove all conceivable evils.

I shall say nothing here respecting the theories which were supposed a few years ago to uphold the right of attempted secession, because I understand them to be now of historical importance only. Nor do I feel the slightest interest in speculating as to what might be the theories which would prevail as to sovereignty should the existing union in some unimaginable way be broken up, the states separated and new combinations formed. Of one thing we may be assured, namely, that in such a contingency, the accepted theories will be such as seem adapted to the circumstances, and whether they would antecedently appear reasonable or foolish, they will prevail if they are found to be useful.

I have spoken of the fact that ten amendments were made to the constitution almost contemporaneous with its being put in force. The eleventh amendment which was made a few years afterwards was made for the purpose of taking away the power of individuals to bring suits against states. It had its origin in the idea of the sovereignty of the states, but it was, I have no doubt, a wise provision, and it stands to this day. The twelfth amendment was one made after the presidential election of 1801,

for the purpose of changing the method of effecting presidential elections, and putting it out of the power of the electors who should be chosen to make the elections, to call one to the presidency who had never been designed for it by the people. You remember the previous system,—a voting for two persons, one of whom was commonly expected to be made president and the other vice-president, but the one intended for vice-president under the system then in vogue might himself be made the president to the defeat of the popular will.

Several amendments have been made since, in our own day. You doubtless have in mind the circumstances under which they were made. They followed the great civil war, and the purpose in making them was to put it beyond question that the issues which had arisen between the loyal and the seceding states during the civil war were finally and conclusively settled.

You will remember also the modes in which amendments are to be made. The first proposal of them may come either from the congress or from the states; but however proposed, they are to go to the states ultimately for adoption or rejection. And they can only be adopted when three-fourths of the states have voted in their favor.

The constitution imposes certain limitations, or did impose certain limitations upon the power of making amendments. These were originally of two classes. First, those of a temporary nature. These were two in number, and the most important purpose was to protect for a certain definite period the rights of the slave-holding states in regard to the importation of slaves. As to this and another subject not calling for attention now, it was provided in the constitution that no amendment should be made prior to the year 1808. But another provision was made that was intended and expressly declared to be permanent. No amendment of the constitution should ever be made that should take from the states their right to an equal representation in the senate. Of course the temporary limitation has long since ceased to be of importance. This other limitation remains still in force, and is intended as a permanent restraint upon the power of congress, the states and the people, in dealing with this instrument. In other words, it is assumed and solemnly agreed in this permanent restraint that when the smaller states had surrendered their right to an equal representation in the whole congress, and an equal voice in all public affairs such as they had under the confederacy, and made

this surrender as the equitable compromise between themselves and the larger states, there was justice in the compromise being preserved forever. It ought, it was agreed, to be put beyond the power of a majority of the people, a majority of the states, or of any proportion of congress ever to take it away. That compromise, therefore, is to stand as it is forever.

To the casual reader of the constitution, it may seem that this, which stands as the only express restraint upon the power of amendment, must be the only restraint that exists; especially when we declare as the fundamental principle of construction that we are to find in the constitution whatever there is of fundamental law underlaying the union that was formed by it. But whether this is entirely accurate is a point to which I shall now for a moment direct your attention.

Before proceeding to anything on that subject, however, I ought to draw your thoughts briefly to a question that happily did not become important, but might very well have become important after the recent civil war; and that is the question whether a state, after once adopting a proposed amendment to the constitution, and while that amendment is pending and has not been fully accepted by three-fourths of the number of states, can withdraw its consent, so that the amendment may be defeated unless three-fourths of the states are secured in its favor without counting the state that withdraws its consent. I say this might have become important. Of course we all understand that the amendments which followed the close of the civil war were amendments that in a great measure were forced by the others upon the states which were then returning to the union, and were made a condition of their being received back into the union. The whole state of things as it existed at that time was something of course that originally was entirely beyond the contemplation of the makers of the constitution. It had not been in their minds that such an attempt would ever be made to break up the union. They made no provision for it. It was wise that they did not. It was wise, it was proper, that they should stand upon the assumption that the government was to exist forever, and that it should have self-perpetuating power. But when the time came that it was necessary to deal with a large section of the union that had withdrawn for a period from under the power of the government, and had only been brought back by military force, the government was com-

pelled to do so in view of existing circumstances, and in ways not in the mind of any one previous to the war breaking out. It was necessary, in other words, to apply something of the military in restoring the civil authority, and in removing whatever was in the way of a complete re-establishment of the government on a basis which promised perpetuity; and the steps taken for this purpose included the requirement of an acceptance by the states, which had been in secession, of amendments that should altogether remove from the constitution anything which related to the institution of slavery except what was incorporated for the purpose of condemning it, and that should altogether forbid distinctions based on race or color, or previous condition. Now these amendments were not, when they were proposed, altogether acceptable to all of the northern states; and while the fourteenth amendment, which undertook to establish equality irrespective of race or color or previous condition, was pending, the states of Ohio and New Jersey adopted it in due form, but afterwards and before it had been adopted by three-fourths of the states, in the same formal way withdrew their adoption,—withdrew their consent. Nevertheless, when the declaration came to be made by Secretary of State Seward, that this amendment had been adopted, he included the States of Ohio and New Jersey as among those that had approved of it. It so happened, however, that at that time three-fourths of the states without counting these two, had assented to the amendment, so that unquestionably it was adopted, whether the consent of these states was to stand or not. The question thus failed to become a practical one. Had it been otherwise, the question might have been brought before the Supreme Court of the United States for decision. I have no doubt the decision of that court upon it would have been binding and final. For this is not altogether a political question. It is a proper question for the judicial department of the government, and might have been brought before that department for decision by any person whose rights were affected by the declaration of adoption of the amendment, or it might have been brought before it by the United States itself through its attorney general. In the last edition of "Story on the Constitution," in a note to section 1930, the opinion is expressed that in the case of a pending constitutional amendment, just as in the case of a pending contract, any party is at liberty to withdraw consent up to the time when it formally becomes a completed instrument. The state of Oregon

also withdrew its consent to the adoption, but that was not until after proclamation of adoption had been made, and that, very clearly, was too late. The case is one, however, that has not up to this time, received judicial consideration.

Let us now turn to the question whether this one expressed limitation to the amendment of the constitution is now the sole limitation upon the power of congress and of the states to amend. It certainly is the sole limitation except these temporary ones to which I have referred that it has heretofore been deemed important should be declared,—should be made a part of the constitution itself. But in my view there are limitations that are far more important than this, that stand unquestionably as restrictions upon the power to amend; and although they may not occur to the mind at once, yet, when they are mentioned, it seems to me it must be as clear as anything concerning this instrument can be, that they do exist; that they must in the nature of things exist; and if there should ever be an attempt to amend the constitution in the particulars to which I shall now refer, it would be held by the proper constituted authorities that the offer was altogether futile. Let me suggest, for example, that three-fourths of the states possessing the power to amend in the manner pointed out by the constitution should, by reason of some prejudice against the section of the union comprising the remaining fourth, proceed to so amend the constitution as to set off that other fourth from the union,—to detach it,—to exclude,—put out the states within it from the union altogether. There is nothing in this constitution that in terms forbids it. Will any one say it may be done? Let me suppose that three-fourths of the states should proceed in respect to the other fourth to establish a rule of taxation that they did not see fit at the same time to apply to themselves. Will any one say that that rule could be adopted by an amendment to the constitution, accepted according to the terms of the instrument, basing his opinion on the fact that it is not forbidden? Let me suppose that an amendment should be proposed creating a special order within the states; a privileged class,—a nobility if you please;—that influence sufficient should be found in three-fourths of the states to secure the acceptance of an amendment to the constitution that should set over us a privileged order. We see at once the amendment is not forbidden in the constitution. Can the privileged order therefore be created? Let me suppose that by amendments proposed and adopted, not perhaps all at once, but by a gradual

process, we should at length reach the point when we should have set over us a king; a hereditary monarch,—an absolute ruler;—“We the people,” having unquestionably the sovereignty and thereby supposed to be empowered to do anything we please, may we not, if we see fit, in this form and by the process which we have chosen to adopt, if we reach the conclusion by and by that we will be better governed by a king than by the rulers we elect,—can we not amend the constitution to provide for it? And so I might go on illustrating the question I am raising at this point by reference to the different governments that exist on the face of the globe, and inquire whether we may not, when three-fourths of our people see fit to adopt the method whereby some other people are governed; whether we may not under this provision which we have so carefully framed and by which we have expressly made a single exception only, proceed to set up for ourselves such a government as we take a fancy to, and which we find in existence somewhere else?

Now replying to this question, I first call your attention to the amendments that have been made to the constitution heretofore. Every one of them, as you will see when you come to consider them carefully, has been in one direction. They each and all have been in the direction of further extending the democratic principles which underlie our constitution. They have increased instead of limiting popular rights; they have enlarged instead of restricting equality of privilege. Not one of them has been in the direction of restoring what was rejected by the people when they declared their independence of the mother country and set up governments for themselves. All of them were entirely harmonious with the general principles of the instrument into which they were brought, and were intended to perfect instead of disfiguring it. That they were, in their nature, proper amendments if assented to by the people, was questioned by no one.

Now an amendment, as I understand it, in the very nature of the case, must be in harmony with the thing amended, so far at least as concerns its general spirit and purpose. It must not be something so entirely incongruous that, instead of amending or reforming it, it overthrows or revolutionizes it. To convert a democratic republic into a government ruled by a privileged aristocracy or by a king, through an amendment of its constitution, is simply an impossibility. The change would not be an amendment but a revolution. The full privilege of amendment, no matter

how completely expressed or declared, would not warrant it, because it could not come within the meaning of the term. And any step in the direction of establishing a government which is entirely out of harmony with that which has been created under the constitution, or which is in the direction of taking the power of the state from the people and of substituting principles of government which were rejected when the constitution was established, though it may be taken in the most formal and deliberate manner, and in precise conformity to the method of amendment established by the constitution, is inoperative in the very nature of things. unless it be taken expressly as a revolutionary proceeding, to be accepted if need be, and upheld, by force. The framers of the constitution must very well have understood that this was the case, and must have acted upon this understanding; and they abstained from forbidding such changes because they would be illegitimate as amendments, and for that reason impossible under the term they were making use of. Their thought was upon changes which in coming into the instrument would find suitable place there because of their harmony with the general purpose: changes that would avoid the necessity or repel the inclination for any resort to revolution; but not such as would favor or accomplish one. In other words, the power of amendment was introduced for preservation not destruction, and the intent is too obvious to admit of any question.

I assert then without hesitation, that we have created a constitution of a democratic republic for the protection and perpetuation of popular rights, and on an assumption that whatever is done under it will be done in conformity with the principles which underlie that constitution. Of nothing is that more especially true than of the provision respecting amendments. If the makers of the constitution, in limiting this provision, stopped short of forbidding such changes as would be inharmonious, they did so because it was not in their thought that any such changes could for a moment be considered by congress or by the states as admissible, since in the completed instrument no place could possibly be found for them, however formal might be the process of adoption; and as foreign matter, they would just as certainly be declared inadmissible and therefore invalid without an express inhibition as with it. The fruit grower does not forbid his servants engrafting the witch-hazel or the poisonous sumac on his apple trees; the process is forbidden by a law higher and more impera-

tive than any he could declare, and to which no additional force could possibly be given by re-enactment under his orders. The principle is as imperative in the political world as in the realm of inanimate nature, and is quite as little in need of express declaration. [We may amend indefinitely, but the amendments must be harmonious with the original structure, as it has become by changes made in the spirit which it then expressed.]

LIABILITY OF PRIVATE CORPORATIONS.

E. F. JOHNSON.

Victor Morawetz, in his valuable work on private corporations, says "that the law relating to private business corporations could not be clearly understood unless the fact is recognized that such a corporation is really an association formed by the agreement of its stockholders and the existence of a corporation as an entity, independent of its members, is a fiction; and that, while the fiction of a corporate entity has important uses and cannot be dispensed with, it is nevertheless essential to bear in mind distinctly that the rights, duties and liabilities, of an incorporated association are, in reality, the rights, duties and liabilities of the persons who compose it, and not an imaginary being." It is true that a corporation is an artificial *person* and is really an association of persons, and no judicial dictum or legislative enactment can alter this fact. But there are many instances where it is absolutely essential to treat the corporate entity, whether a *fiction* or not, as a separate and distinct *person* from its individual members; and it may be laid down as a general rule, that the convenient administration of justice is best served by treating a corporation as a collective entity without regard to its individual shareholders, in all cases, except those in which the equitable rights and liabilities of the shareholders cannot be ascertained and enforced without considering the real relation existing between the parties.

The interest of a shareholder in the stock of the corporation is independent and separate from his individual property. This is important in order that the title to property may be kept free from complication or uncertainty. The property and legal interests of the corporation are managed or controlled by agents, who represent the *legal fiction*, and not the individual shareholders. It is therefore important that the title to property vested in a corporation should not be affected by any acts of the shareholder, except as he acts as agent, with authority, of the corporate entity. I shall endeavor in this brief article to discern when a corporation is liable, treating it as a legal entity; without reference to the

liability of its individual shareholders, leaving that for a subsequent article.

Corporations have a capacity to sue and are liable to be sued in their corporate name. This power and liability is usually granted and imposed by the authority creating them. They are not only liable to be sued like private individuals, for breaches of contract, but they may be sued by a special action on the case for neglect and breaches of duty, and in actions of trespass and trover, for damages resulting from trespass and torts committed by their agents under authority.

The amount of the capital stock of a corporation, is fixed at a definite sum by the charter or other instrument which has been agreed to by the shareholders, as containing the essential conditions of their contract of association. It is so fixed for three reasons:

1. For the purpose of determining the scope of the company's business.
2. For the purpose of ascertaining the relative rights and obligations of its shareholders as among themselves.
3. For the purpose of obtaining commercial credit.

The capital stock of a corporation is a fund for the payment of its debts and is also the limit of its liability, except where it is especially made liable for more than that amount by statute—which has been done in several of the states. Therefore every person who becomes a shareholder in a corporation and every person who deals with it, understands that the fund contributed or agreed to be contributed as the company's capital shall be charged with the payment of the corporate debts. It is also understood, by those who give the corporation credit, where there is no express provision to the contrary, that the fund so charged shall be their only security and that the individual shareholders shall be free from liability. There is no individual liability on the shareholders, in the above case, where they have paid in their full amount of subscribed stock, otherwise they would be liable for the amount not paid. The question might arise whether or not a shareholder, who had paid but fifty per cent of his subscribed stock, could forfeit his stock and therefore be relieved from any liability after the corporation had become a debtor. Certainly he cannot for the following reasons:

1. In every contract entered into by a corporation, there is

an implied agreement that the company's capital stock is pledged as security for the corporate debts.

2. In every such contract there is an implied representation that the capital stock indicated by the company's charter has been preserved for the purposes for which it was provided.

Mr. Justice Sawyer said: "Corporations are not only liable upon contracts but are also liable for every wrong they commit, and in such case the doctrine of *ultra vires* has no application. They are liable for the acts of their servants, while such servants are engaged in the business of their principal, in the same manner and to the same extent as individuals are liable under like circumstances." "It was at one time thought impossible that a corporation could be liable for a *tort*, but the rule is now well settled," says Chief Justice Cooley in his valuable work on torts, "that while keeping within the apparent scope of corporate powers, corporations have a general capacity to render themselves liable for *torts*." This rule of liability would seem to embrace, not only the negligence and omissions of its officers and agents who are put in charge of or employed in the corporate business, but also all tortious acts which have been authorized by the corporation or which are done in pursuance of any general or special authority to act in its behalf on the subject to which they relate or which the corporation has subsequently ratified. And in this case it is not material whether the corporation has received any benefit from the act or not. If the acts of the agent were willful the corporation will be liable even though the acts were not directly authorized or perhaps against the instructions of the corporation.

A private corporation may be liable for an assault and battery when its agent in committing it, was performing some act within the limit of his authority, but wrongfully or with excessive force. Judge Champlin says "if a corporation compose a libel and send it to its agent, to be read by him, and it reaches its destination and is read by such agent, it is a sufficient publication to support an action for libel, and the corporation would be liable therefor." A corporation may also be liable for libel in the case where its directors in making an official report in which is embodied a libel on a business rival. This is clearly a corporate wrong, because the making of the report was a corporate duty or act, and the directors were acting within the scope of their authority in making it. Chief Justice Campbell said: "The character and doings of private persons, not developed in legal

proceedings or voluntarily made public, cannot be properly discussed in print; and for all libels every publisher, whether an individual or a corporation, is responsible to the extent of any special damages and any estimated damages to credit and reputation."

Where a corporation employs an agent to detect and arrest offenders against its property, and such agent acting within the scope of his authority arrests an innocent person, such corporation is liable therefor, although the particular act was not authorized, and an action for malicious prosecution could be maintained. By the great weight of modern authority, a corporation is liable for the fraud or malice of its authorized agents; the fraud or malice of the agent being imputed to the corporation.

Strictly speaking, a corporation itself cannot be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trade or other speculation for profit which object can only be accomplished through the agency of individuals, there can be no doubt of the liability of the corporation for the fraudulent acts of such agents in behalf of the corporation. Of course, no agent of a corporation has actual authority to make false representations on behalf of the company; but they have authority in many instances to make representations upon which persons dealing with the company are expected to rely; and if the representations are of a class which would ordinarily be within the apparent powers and duties of the agent, a person dealing with the agent in good faith may assume that the representations were in fact authorized and the corporation would be liable, if such representations were false and fraudulent. The principle that a corporation may be liable for false imprisonment is now well established.

The right of a corporation to issue negotiable paper for any of its lawful purposes is incident to its express powers or objects and it may be held liable, not only upon negotiable instruments which it has expressly authorized, but also upon those issued by its treasurer in accordance with a usage. And where a corporation has power to issue evidences of credit it is liable on them when in the hands of "bona fide" holders, although they were issued for improper uses or purposes.

Corporations are, in general, bound by all contracts, whether express or implied, whether by bond, bill of exchange or negotiable note, entered into in the usual and necessary course of their legitimate business, except where there is a statutory prohibition. A corporation may be bound by an *ultra vires* contract provided it has

received some benefit from such contract or where it is impossible to place the parties *in statu quo*.

Exemplary damages is a penalty or punishment inflicted upon the defendant for the public good. The fine is given by way of gratuity to the person on whom the tort was committed instead of to the people as in a criminal prosecution. The general rule seems to be that a principal cannot be made to pay exemplary damages for the acts of his agent, and consequently a corporation could not be liable for such; but if the principal has been guilty of negligence in appointing an incompetent agent or has afterwards knowingly ratified the agent's wrong, he will be liable for exemplary damages. Some of the courts hold that punitive damages may be inflicted upon a corporation for a wrong committed by any of its agents whenever the agent may be charged with damages of that character.

Does the word "persons" when found in the statutes apply to and include corporations? It has been held that where the word "persons" appears in the tax laws it includes corporations as well; but this cannot be stated to be a general rule, for it has been held by the supreme court of the United States that a corporation has no right to migrate into another state than the one creating it and do business there, if objection is made. A great number of the states have by statute forbidden foreign corporations from entering their borders and doing business therein without first obtaining permission. Some of the states have gone even farther than to require them to first obtain permission and have in addition imposed a tax or license fee upon them, a condition and a burden which one state cannot, under our constitution, impose upon the citizens ("persons") of another state. A corporation can have no legal existence outside the state creating it. It can act outside the state giving it existence, if it can get permission, but it has no absolute right so to do. It is not a citizen within the meaning of our constitution.

The business or franchise of a corporation as well as its property, are legitimate objects of taxation, unless there is something in the act by which it was created which expressly exempts it from this burden. It is well settled that a state, in creating a corporation may relieve it from the burden of taxation. But a state cannot impose a tax upon the goods of a corporation in passing from one state to another.

It has been held that a corporation may be indicted for doing

any act which is made indictable, without regard to the intention of the offender, that is, in all cases where the crime consists of the act alone. A corporation cannot be indicted for the commission of a crime involving malice, and therefore cannot be indicted for felonies, as treason, murder, perjury, etc.

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CAN an affidavit be legally sworn to over a telephone? We do not know that any court has yet been called upon to answer this question. But it is only a question of time when the point may be raised. To our certain knowledge the practice prevails to some extent. It is, to say the least, questionable whether the subscribing notary can legally say that the affiant "personally appeared," in the real meaning of the jurat. It is extremely doubtful whether an affidavit or verification so made would be held sufficient if put to a legal test.

THE recent decision of Chief Justice Paxson of Pennsylvania, in *Commonwealth v. Matthews*, holding that Sunday newspapers are not "works of necessity and charity," and therefore not within the exceptions of the act of 1794 prohibiting the performance of any worldly employment on the Lord's Day, suggests another question concerning the status of Sunday newspapers, viz: Is the publication in a Sunday newspaper of legal publications and notices, required by law to be published a certain number of weeks in some "newspaper printed in the county," etc., a sufficient compliance with the statute? We leave the question for those better informed upon the subject to answer.

THE various bills for the relief of the supreme court are still in committee. One of them will probably be reported in the early part of April and be pushed to passage. In addition to the bill of the state bar association, a bill whose authorship is obscure has been introduced and referred to the committee on judiciary, the purpose of which is to establish intermediate courts of appeal.

In view of the fact that the bill providing for an increase in the number of judges is backed by the state bar association, which represents the legal ability of the state, it is probable that the intermediate courts' bill will be shelved. The indications are that the legislature will provide for an increase of two or three judges. Whether this will solve the problem or not is mere conjecture; and at the best, such an increase is a matter of experiment.

IN his annual address before the American Bar Association in 1891, Alfred Russell, of the Detroit bar, summed up, in a most logical and eloquent manner, the arguments in favor of the abolition of the jury system. "But we know," said Mr. Russell, "that is hardly fifty years since wager of battel was lawful; and only about four times fifty since torture was a recognized method of arriving at facts, and sanctioned by the brightest intellects, such as Bacon himself; and thus we may gather hope that the remaining mediæval method in courts may soon depart—the jury in civil cases." It may be interesting to Mr. Russell, who opposes the adoption of a code, to learn that Bengal has already taken this step, and has abolished trial by jury. India has always been alive to the advantages of law reform. It was India, first of British provinces, that codified the common law.

A RECORD remarkably clear has always been the boast of the legal profession. It may safely be asserted that no other profession has had so few defaulters, and this seems all the more remarkable when we remember that the lawyers of the land transact the business and hold the property in trust for the majority of the business men of the country. However, there have been defaulters even in the legal profession, and the course the profession pursues in regard to such, is to immediately disbar them. An attorney disbarred, feels just as a soldier, who, for misconduct, has been deprived of his shoulder straps. It is a severe punishment, and should be resorted to only in clear cases of professional misconduct, but when once resorted to, in order that the remedy may retain its efficacy, it should continue forever a bar against the wrongdoer acting again as an officer of court. If in individual cases we allow sentiment to get the better of reason, and restore to confidence the one disbarred, the remedy will lose its effect, and in time become a mere temporary expedient. When a finding of "guilty" has been rendered against a criminal, the verdict is never expunged from the records; and we should scrutinize more closely still any attempt to avoid the effect of a professional disbarment.

THE last issue of the *American Law Review* contains an excellent article upon the liability of sleeping car companies for loss

of baggage, by the Hon. Samuel Maxwell, the veteran justice of the Nebraska supreme court. This subject has been a fruitful source for considerable discussion among legal periodicals. As in some other things, Justice Maxwell has been considerably in advance of the views of the majority who have given the subject attention. He has been practically alone in his position that the sleeping car company should be held to strict accountability, and that their liability is the same as inn keepers so far as they render service similar. A careful review of the decisions upon the subject will convince one that the courts have been gradually leading up to the theory of Justice Maxwell as expressed in his somewhat celebrated decision in *Pullman Co. v. Lowe*, 28 Neb., 248; 44 N. W. Rep., 226; 6 L. R. A. 809; 40 Am. & Eng. R.R. Cases; 41 Alb. L. Jour., 230; 30 Cent. L. Jour. 245; 29 Am. L. Reg. 251; 18 Wash. L. Rep., 192. Later decisions, though they do not go quite so far, show a marked disposition on the part of the courts to hold the companies liable in a far greater degree than formerly. It is but a question of time when they will be held strictly liable as inn-keepers. Inasmuch as they undertake exactly the same service, viz: to provide for the wants of their patrons, why should not the measure of their liability be exactly the same? What matters it that the service is not precisely alike in every detail so long as the wants of the guest are provided for? The learned writer of the article above referred to very pointedly concludes: "In any event the sleeping car charges will considerably exceed those of a first-class hotel, on the same route. Now can any valid reason be given why the traveler while stopping at an inn along his route should be protected but will be without protection in the sleeping car?"

THE bench and bar of Chicago have been struggling with the problem of how to expedite business in the courts. It seems that business in the courts of record of Cook county is even more congested than is the case with the supreme court of Michigan, a remedy for the relief of which, the state bar association recently prescribed. There are about 8,000 cases pending in the superior court of Chicago, the average number commenced daily being 30, and the average number disposed of daily being 20. In the circuit court there are 16,000 cases pending. The average number commenced daily is 35 and the daily average disposed of is 30. There are 600 cases pending in the county court. Litigation is already too much of a farce in the large cities of the country because of the rapid accumulation and slow disposition of cases, from an ancient system of judicial procedure and a complicated scheme of courts. The bar association of Chicago recently held a meeting to discover remedies for the serious state of affairs in the Cook county courts, and we are pleased to report that no overdrawn sense of alleged propriety deprived the meeting of the experience and counsel of the judges who preside over the courts

which need relieving. The judges were present and contributed many valuable suggestions that otherwise might not have been made. Some of the recommendations urged were as follows: To divide the judiciary so that criminal judges would not need to listen to civil cases; to lengthen the hours of holding court, to which proposition, however, the judges demurred, showing to the surprise of the bar and to the satisfaction of most of the lawyers present, that they spent more of their time at their work in court and out than the most active lawyer in Chicago, and that if the number of hours for hearing cases were increased the judges could give but little time to the study of cases out of court, thus working injury to litigants. One of the judges was of the opinion that if it could be constitutionally adopted, the best plan would be to pass a law giving the judges power to appoint as many referees from members of the bar as would be necessary to clear out the docket, and keep it clear, and to allow writs of error and appeal from the rulings of the referees without retrial by the judges. A member of the bar thought that the remedy was in the increase in the number of judges. Another one of the judges uttered hard, common sense, when he urged that attorneys spend less time in arguing trivial motions, and in examining jurors and witnesses. He said: "I do not see why it is necessary to ask each individual juror what his grandfather was, what his religion and politics are, and what he thinks of marriage and free trade," and we may add that it is equally ridiculous and foolish to ask the same questions or others as irrelevant, of witnesses. Another judge thought that needless cross-questioning would soon become a thing of the past if a system of taxing costs at a *per diem* rate prevailed. The bar arrived at no conclusion as to the best method of relief, but will consider the question further.

THE supreme court has framed the following rules, one the adoption of a chancery rule, another an amendment to a circuit court rule and the third an amended supreme court rule:

CHANCERY RULE 125. Whenever the complainant in a chancery suit, wherein the right is under existing rules of law and equity assignable, shall have transferred his interest in the subject matter of the litigation, either voluntarily or by process of law, the suit shall not thereby be abated, but the transferee may present his petition to the court in which said suit is pending, setting up the fact of such transfer and asking to be substituted as complainant in said suit. The facts, if they do not appear from the records of the court, shall be verified by the affidavit of the party or of some other person. If at the hearing it appear to the court that such transfer has been made, an order shall be made substituting the transferee as complainant in said suit, and said suit shall continue for the benefit of said transferee as though no transfer had been made. A copy of the petition and affidavits,

with the usual notice of presenting the same. shall be served on the defendant or his solicitor, and in making such order the court may in its discretion require the transferee to file security for costs. Adopted March 9, 1893.

CIRCUIT COURT RULE 9. In case of service by mail, such service may be made by putting the notice or papers into the post-office, with postage prepaid, directed to the attorney or party at his place of residence, to be ascertained according to the best information and belief of the person making such service. And in such case the time of service must be increased one day for every one hundred miles distance between the place of deposit and the place of address. As amended March 9, 1893.

SUPREME COURT RULE 50. Whenever any record in a case at law, brought up on writ of error or case made, is so prolix as to cause vexation by reason of the multiplicity of frivolous assignments, or by any other abuse, it shall be within the discretion of the court to grant such costs against the prevailing party who is responsible for such abuse, as may offset in whole or in part, the costs to which he would otherwise be entitled. A copy of the printed record in civil cases at law and in chancery, together with a printed copy of the brief, shall be served by the party bringing the case into this court upon the attorney or solicitor of the opposite party in the court below, if he have one, if not, then upon the party, at least twenty-five days before the first day of the term for which the cause is or shall be noticed for hearing or argument; and the attorney or solicitor of the opposite party shall serve a printed copy of his brief upon the attorney or solicitor of the other party within twenty days thereafter. Either party may print and serve upon the other party supplemental briefs at any time before the case is placed upon the call for hearing or argument. All briefs except supplemental briefs, shall be filed with the clerk at least forty-eight hours before the case is placed upon call. No oral argument will be heard on behalf of a party failing to comply with the last provision of this rule. Any cause may be submitted upon briefs by stipulation at any time. As amended February 17, 1893.

CHIEF JUSTICE HORTON AND THE KANSAS LEGISLATIVE QUARREL.—When the famous decision, settling the Kansas legislative muddle so effectually, was recently published throughout the country by the press, it was not known by more than a few that the author of that decision was a former student of the University of Michigan and one of the select few whom the Board of Regents of the University have seen fit to honor with the degree of LL. D. Chief Justice Albert Howell Horton was a student in the literary department of the University from 1856 to 1858. He was a presidential elector in Kansas in 1868, and has been chief justice of the supreme court of that state since 1877. The hon-

orary degree of LL. D. was conferred upon him at the commencement of the class of 1889.

The decision *In re L. C. Gunn*, original proceedings in *habeas corpus*, is one of that class of judicial decisions in cases involving political quarrels, (of which contested election cases and the numerous questions arising under them form a great part,) which has been increasing with alarming rapidity in recent years. The time was when the legislative department of government in this country could take care of itself and when resort was rarely had to the judicial tribunal to settle disputes. But it has come to be the fashion nowadays for political parties, especially where almost evenly divided, to rush to the courts in order to gain advantages over each other. This is to be regretted, of course, but it is gratifying to note that in the recent Kansas case, at least, the opinion of Chief Justice Horton is a candid, able, and erudite masterpiece as a judicial utterance, and is not weakened by the suspicion of alleged unfairness caused by political bias. It will be accorded the weight of a leading decision, and the attitude of the press throughout the country is sufficient approval of its wisdom and equity.

In the Kansas case, the proceeding was brought by one L. C. Gunn, who had been arrested by the house of representatives known as the "Douglass house," for his discharge, upon the ground that the house was not properly organized and was not the constitutional house of the state of Kansas. Under the constitution and laws of the state, the house of representatives consists of 125 members. At the time Gunn was arrested for refusing to obey a subpoena to testify in an election case, concerning the seat of a member of the legislature, the "Douglass house" consisted of 63 republicans, one independent, and democrats numbering three, making 66 having lawful certificates or credentials of election, and also of another democrat, who was admitted after organization, whom all parties conceded was legally elected. The "Douglass house" therefore consisted of 67, four more than a quorum. The other house, known as the "Dunsmore house," consisted of 58 members, all populists, who also had certificates of election. But 58 is five less than a quorum under the constitution and laws of the state. These two houses or bodies held their sessions in the same hall or room for many weeks, and each privately called, for their support and protection armed bodies of men. After the decision in the case of *In re Gunn*, peace was proclaimed and the so-called "Dunsmore house" recognized the "Douglass house" as the constitutional house of representatives, and the proceedings of the legislature thereafter were carried on peaceably, effectively, and legally. After the decision, only one house, the "Douglass house," was recognized by the governor and state senate. The syllabus of *In re Gunn* was prepared by the court and is very lengthy. It is a very clear statement of the law gov-

erning the case, and we regret that we have not the space to publish it in full.

A NEW AND EFFECTIVE METHOD OF SETTLING STRIKES AND BOYCOTTS.—It seems that the press of the country has failed utterly to grasp the great significance of the restraining orders and the injunctions issued by Judges Taft and Ricks in the circuit court of the United States for the northern district of Ohio, in the strike and attempted boycott of the Toledo, Ann Arbor and North Michigan Railway Company by the Brotherhood of Locomotive Engineers and Firemen. It is but a phase of the old problem of settling difficulties between capital and labor. It is unnecessary to recite at length the facts in this case, as the public is already familiar with them through the daily press. Suffice it to say that the engineers in the employ of the T., A. A. and N. M. R. R., were dissatisfied and "struck," i. e. quit work. Non-union engineers were employed by the railroad company to run the freight engines. The striking engineers made no attempts to interfere by assaults or threats, with the non-union engineers, and in this respect the strike differs from most railroad strikes. But when the non-union engineers placed the freight of the T., A. A. & N. M. R. R. at the termini of the connecting lines, eight in number, in the city of Toledo, the Brotherhood engineers in the employ of the connecting lines refused to receive the freight, because it was delivered to them by non-union engineers. Now it is that the United States Court steps in and, because the engineers of the connecting lines refuse to handle freight delivered to them by the complaining company, thereby violating the interstate commerce law by interfering with the interchange of traffic, (1) orders the connecting lines, their agents and employes, to receive the freight, and (2) enjoins the officials of the Brotherhood from issuing orders to or inducing or persuading the engineers of the connecting lines to refuse to handle freight from the complaining company. These injunctions are preliminary. Whether on the hearing they will be made permanent, can only be conjectured at this writing. It is entirely probable, however, that they will.

There can be no doubt of the effectiveness of such injunctions. If the engineers of the connecting lines, after knowledge of the injunction, should continue to refuse to receive the freight tendered by the complaining company and yet remain in the employ of the connecting lines, they would be guilty of contempt of court and subject to fine and imprisonment, and the military forces of the United States could be called into requisition if the execution of process should be resisted by forces too strong to be overcome by United States marshals. It can readily be seen that it would be a serious thing to oppose the almost limitless power of the federal government. But this is not all. The connecting lines are guilty of an infraction of the interstate commerce law

when they refuse, through their employes, to receive the freight, and liable to a fine of \$5,000 for each offense. It is a serious matter also, therefore, to the connecting lines if their employes refuse to receive the freight, and their only course, therefore, is to discharge the Brotherhood engineers and employ non-union engineers who will receive and handle the freight.

This unique course has never been pursued, heretofore, as a method of settling strikes. It opens the question whether all railroad strikes could be brought to a speedy termination by the same or a similar proceeding. There is hardly a railroad strike occurs but which either directly or indirectly results in a breach of the interstate commerce law, and therefore becomes a matter falling under the jurisdiction of the United States courts. If the proceedings resorted to in *T., A. A. & N. M. R'y Co. v. The Pennsylvania Company* should be employed in all railroad strikes, the strength of the Brotherhood of Locomotive Engineers and Firemen would soon dwindle to inconsiderable proportions. The organization is a perfectly legitimate one as long as it does not interfere with the company by persuading or forcing non-union men to resign or quit work, by threats, or force, or bodily assault. Railroad employes have a perfect right to strike when the strike does not extend beyond merely quitting work and leaving the property of the company in good condition, but just as soon as the strikers intimidate and assault the non-union men, the law should interfere, and there is no more powerful law than the federal law.

*LAW SCHOOL NOTES.**

Inasmuch as a great number of the students, in attendance at the law department of the University of Michigan, have little or no knowledge of the actual workings of the courts, it has been recommended by the faculty that a "Practice Court" be established within the department, to be under the supervision of some member of the faculty, where the second year students might have an opportunity to put the theory of pleading into actual practice. This work has been placed under the control of Prof. E. F. Johnson. In speaking of the objects of this new feature Mr. Johnson says:

"A student may have finished his course in the theory of pleading and not be able to draft the simplest pleading, while on the other hand, he may, by mere routine office work, be able to draft a more difficult declaration or petition without knowing the first rudiments of pleading. The investigation of the law should go hand in hand with the study of pleading and therefore there is no place so well suited for the proper training of a lawyer, in the actual practice, as in a law school. A lawyer can never become a good pleader who is unable to apply the law to any given statement of fact. Every good declaration or petition consists, in fact, of a syllogism of which the major premise (implied) is the proposition of law, the minor premise, the statement of fact, and the conclusion, the demand for relief.

"There is a feeling in some localities, that a young man can prepare himself better for the actual practice and work of a lawyer in an office with a practitioner than he can at a law school. To this I am inclined to take exception, for the reason that a lawyer in actual practice and one who is able to give such instruction to a young man, has not the time, even though he has the disposition, to give him that direction which he should have. And another and better reason why this work can be done in a law school with more satisfactory results than in an office, is, that the surroundings are better adapted for research where there are several hundred students all making the same investigation, each one endeavoring to be most thorough. What would the medical profession of to-day think of a school of medicine without a clinic? That is, one where theory alone is taught, and where the faculty should fail to give the student an opportunity to apply some of his theories, or at least see them applied. As the pleadings are the means by which the machinery of the court is brought into motion, it would seem that the student of law ought to be taught, while pursuing the study of the law, how to use these means, not only theoretically but actually."

Various law classes will hold reunions at Chicago this year. A general reunion of the entire law department will probably be held at Ann Arbor during commencement. The class of '91 have arrangements nearly

* This department will hereafter be conducted by Professor E. F. Johnson of the Law School, assisted by a student, who will be selected before the issue of the May number.

completed for their reunion, which will be held July 3. A business meeting will be held at 2 p. m., and a banquet in the evening. F. A. Henry, of Ohio, will act as toastmaster. The committee selected by the class to arrange for the reunion are: N. A. Phillips (Pa.); F. A. Henry (Ohio); J. R. Newcomer (Ill.); S. E. Low (Nev.); E. B. Tyler (Neb.), and H. D. Jewell (Mich.). The latter has been made chairman *pro tem.* of the committee, during the absence of Mr. Phillips abroad. The local committee on arrangements at Chicago are: J. R. Newcomer, G. A. Wissler, W. E. Lindsay, C. M. Hamper, W. H. Slack, M. G. Foreman, W. F. Wanless, G. W. Pierson and C. O. Knudson. This committee will also secure rooms for members of the class and their friends. The day following the banquet an excursion on the lake or a "picnic" in one of the parks will be given. The members of the class are much interested in the affair, and it promises to be one of the most largely attended of all the class reunions.

The "Chicago Correspondence School of Law" is a new enterprise which is highly spoken of by the press and sanctioned by the bar of that city. It is incorporated, and the work is at present divided among a corps of sixteen instructors, five of whom were members of the law class of '91. The officers (all members of that class) are: Washington E. Lindsay, president; Grant Foreman, vice-president, and William H. Slack, secretary and treasurer.

It is currently reported, and on inquiry found to be true, that Prof Nathan Abbott, formerly Tappan Professor of Law, now one of the faculty of Northwestern University Law School, has accepted a professorship in Leland Stanford, Jr., University.

Hon. Frank A. Hooker, chief justice of the supreme court of Michigan, and candidate for re-election on the republican ticket, graduated from the law department in 1865.

Robert E. Bunker of Muskegon, candidate on the democratic ticket for regent of the University, is a graduate of the law department class of 1880.

George P. Castle, one of the commissioners from the Hawaiian Islands to the United States, was a student in the University in 1872 and 1873.

Hon. Edwin Willitts '55 is spoken of as a successor to President Clute of the Michigan Agricultural College, who has resigned.

MONTHLY RECORD OF SUPREME COURT DECISIONS.*

BOND FOR RETURN—Construction—Measure of damages—Manufacturer's prices—Liability of surety. *Wheeler v. Meyer*. McGrath, J. Error to Wayne. Reversed.

CRIMINAL LAW—Admissibility of testimony by accused of specific acts of violence within his knowledge—Testimony as to which party was aggressor. *People v. Harris*. McGrath, J. Error to Wayne. Conviction and sentence set aside and new trial ordered.

CRIMINAL LAW—When bar-tender and not employer liable for violation of license acts. *People v. Metzgar*. Long, J. Exceptions from Recorder's court of Detroit. Affirmed.

DEED—Fraudulently obtained. Where grantor mentally incompetent. *Peck et al. v. Cook*. Montgomery, J. Appeal from Kent. Affirmed.

DEED—Involuntary execution—Re-delivery. *Snyder v. Snyder*. McGrath, J. Appeal from Oakland. Affirmed.

ELECTIONS—State officials *ex officio* members of state board of canvassers—Inspectors of election, statute governing duties of—Consolidation of returns from several precincts of a township. *Belknap v. Board of State Canvassers*. Mandamus granted.

EVIDENCE—When competent for physician to testify what percentage of persons in plaintiff's condition recover their health—Admissibility of record of conviction of plaintiff of violation of pension law to impeach credibility—Absence of plaintiff from trial, how to be construed—Effect of one false statement upon balance of testimony. *Cole v. L. S. & M. S. Railway Co.* Grant, J. Error to Washtenaw. Affirmed.

FENCES—A partition fence under How. Stat., 797—Replevin for property taken for a tax—How. Stat. 8318 construed. *Lantis v. Reithmiller*. Hooker, C. J. Error to Jackson. Reversed and new trial.

GARNISHMENT—Alleged defects in affidavit. *State Savings Bank v. Hosmer*, Circuit Judge Wayne County. Per curiam. Mandamus denied.

HIGHWAYS—Approach to bridge—Construction of act No. 391. Local Acts of 1879. *Abrey v. Livingston, Jr.* Long, J. Appeal from Wayne. Bill dismissed.

HIGHWAYS—Defective condition, causing accident—Shying horse as a contributory cause—Immediate real evidence—Impeaching witnesses. *Longworthy v. Township of Green*. McGrath, J. Error to Mecosta. Reversed.

HIGHWAYS—Proceeding necessary to establish—What necessary to establish by use. *Schroeder v. Village of Onckama*. Grant, J. Appeal from Manistee.

INSURANCE—Endowment rank K. of P., beneficiaries in, how named. *Eckler v. Terry*. Grant J. Error to Jackson. Reversed.

INSURANCE—Michigan Standard Policy—Effect of adding clause not provided for—When "void" in statute construed to mean "voidable."

* Copies of the opinions of the supreme court may be obtained, upon application, from Charles C. Hopkins, clerk of the supreme court, Lansing, Mich.

Armstrong v. Western Manf. Mutual Ins. Co. Grant, J. Error to Kent. Reversed.

INTERPLEADER—When proper proceedings in courts of chancery—Parties with equitable interest only—Liability of bailee to real owner for deposit made by third person—Gifts *mortis causa*, sufficiency of delivery to constitute. *People's Savings Bank v. Look, et al.* Long, J. Appeal from Wayne. Affirmed.

JUSTICES OF THE PEACE, jurisdiction of, under loggers' lien act (Act No. 229, Pub. Acts 1887). *Lansing Marble v. Burlingame.* McGrath, J. Error to Benzie. Reversed.

JUSTICES OF THE PEACE, sufficiency of service of summons from, on corporation to give jurisdiction—Estoppel in fact. *Wilson v. California Wine Co.* Long, J. Appeal from Kent. Reversed.

LIBEL—How fully truth of publication must be proven, and statements made justified—Questions for jury. *McAllister v. Detroit Free Press Co.* McGrath, J. Error to Wayne. Affirmed. (This case before reported in 76 Mich., 338; 85 Mich., 453.)

LIEN—When attaches for materials furnished for building—Waiver, aking of personal judgment not construed as—Jurisdiction, consent of parties cannot confer. *Kirkwood v. Hoxie.* Hooker, C. J. Appeal from Gogebic. Affirmed.

MIS-TRIAL—Circuit judge renders decision, after plaintiff rested, without assigning reasons. *Rayl v. Hammond Estate.* Grant, J. Error to Wayne. Reversed and new trial.

MORTGAGE—Of life estate of widow and reversionary interest of daughters—How mortgage may be discharged by payment. *Horton v. Howard.* Grant, J. Appeal from St. Clair. Decree modified.

MORTGAGE—Right to assignment and redemption—Good faith in publication of notice of foreclosure. *Moore v. Smith.* Long, J. Appeal from Kent. Modified.

MORTGAGE—Subsequent mortgagee—When notice of prior unrecorded mortgage presumed. *McGill v. Coker.* Montgomery, J. Appeal from Cass. Affirmed.

MORTGAGE—Tender, amount necessary to secure discharge—Subrogation—When third person advancing money to pay debt substituted in place of creditor. *Desot v. Ross.* Montgomery, J. Appeal from Macomb. Affirmed.

MUNICIPAL CORPORATIONS—Special city assessments and the jurisdiction of the supreme court—Construction of charter. *Auditor General v. Maier.* Grant J. Appeal from Saginaw. Affirmed.

MUNICIPAL CORPORATIONS—Same points decided as in *Auditor General v. Maier*, above, with one exception—Effect of stipulation to stay proceedings until an identical case before the supreme court was decided. *Auditor General v. Smith.* Grant, J. Appeal from Saginaw. Rehearing granted and decree affirmed.

NEGLIGENCE—Contributory—Admissibility of evidence to prove condition of street before accident. *Corcoran v. Detroit.* Hooker, C. J. Error to Wayne. Affirmed.

PROBATE COURT—Appeals from decisions of—When appeal by co-heir does not make other heirs party to the record. *Comstock v. St. Clair Circuit Judge.* Per Curiam. Mandamus denied.

PUBLIC MARKETS—Removal of, by council—Effect on tenant's rights. *Petz v. Detroit.* McGrath, J. Appeal from Wayne. Reversed.

RIPARIAN RIGHTS—Right of one holding under land contract, not owner of fee, to recover for injury to freehold—Description in deed, sufficiency of. *Des Jardins v. Thunder Bay River Boom Co.* Long, J. Error to Alpena. Affirmed.

SALE—Breach of executory contract—Measure of damages—Testimony as to market value excluded. *Peters v. Cooper.* Montgomery, J. Error to Clinton. Reversed.

SERVICE—Personal and substituted—When return of sheriff of notice of attachment is valid. *Cochran v. Johnson.* Long, J. Error to Gogebic. Affirmed.

SLANDER—Evidence—How exactly words alleged must be proven—What regarded as part of *res gestæ*—Malice, how proven—Proof of business standing of defendant to increase damages—Provocation in mitigation of damages—Instructions to jury—Right to show different intention. *Ellis v. Whitehead.* Hooker, C. J. Error to Ingham. Affirmed.

STREETS—Damages caused by defective condition during repairs—Liability of contractor where defect occasioned by member of board of public works. *Kulwicki v. Munro.* Montgomery, J. Error to Wayne. Affirmed.

TAXATION—Liability of supervisor for neglect to compel disclosure of taxable property—Construction of Act No. 200 Pub. Acts 1891—Directory and mandatory statutes—Surplusage. *Turner, Prosecuting Attorney v. Muskegon Circuit Judge.* Mandamus to vacate order quashing information granted.

NOTES OF RECENT MICHIGAN DECISIONS.

EFFECT OF INSERTING CLAUSE NOT PROVIDED FOR BY STATUTE IN POLICY OF INSURANCE.—Insurance men and their patrons will be particularly interested in *Armstrong v. West. Manf. Mut. Ins. Co.* (March 10, Grant, J.). The Insurance Act prohibits the issue of any policy containing any other or different terms than those expressed in the Michigan Standard Policy. It thus declares (How. Stat. 4349): "Every policy or contract made or issued contrary to the provisions of this act shall be void." The policy in question was in exact conformity with the statute except that a clause not provided for was added at the end. The insurance company sought to avoid payment on the ground that the insurance policy was void under the statute. The court refuse to sustain them in this unreasonable position. They hold this statute to come clearly within that class of cases which hold the word "void" to mean "voidable;" and that it comes within the principle laid down in *Beecher v. Rolling Mill Co.*, 45 Mich., 103.

HOW FAR HEIRS-AT-LAW AFFECTED BY APPEALS OF CO-HEIR.—An entirely novel question in this state was presented in *Comstock v. St. Clair Circuit Judge*. "The precise question involved," the court say, "has never been passed upon in this court." An appeal from the decision of a probate judge was taken by one heir and was pending in the circuit court and undisposed of until after time for appeal by the other heirs had gone by. Subsequently a judgment dismissing the appeal was consented to and allowed. The other heirs asked for a mandamus to compel the circuit court to set aside the judgment and permit them to appear and prosecute the appeal made by their co-heir; the sole question presented being whether an heir not joining in an appeal from a proceeding in the probate court becomes a party to such appeal in such a sense as that it cannot be discontinued or dismissed without his consent. In short, whether by the mere fact of an appeal by a co-heir he is made a party to the record. Following *Kent v. Dunham*, 14 Gray (Mass.) 279, construing the Massachusetts statute upon the subject, after which ours is patterned, the court held that the other heirs did not thereby become a party to the record. The petitioners having assumed none of the burden of prosecuting the appeal taken by the co-heir, the latter has complete control over the proceedings. The mandamus was accordingly denied.

BOOK REVIEWS.

MAXWELL ON CODE PLEADING.—A Treatise on the Law of Pleading under the Code of Civil Procedure, designed for all the Code States. By Samuel Maxwell, Chief Justice of the Supreme Court of Nebraska. Chicago: Callaghan & Co.

The question of the adoption of a code is at present agitating the minds of the lawyers of Michigan just as it has in a majority of the states from time to time. In every instance a thorough investigation of the subject and a careful and unbiased study of the workings of a code, and a comparison with the old common law procedure, has resulted in codification. In order to bring this about the leaders in the work of law reform have had to contend with existing prejudices, and been obliged to overcome the opposition of many older members of the bar, who were wedded to the common law and chancery practice. The foremost leader in this work has been David Dudley Field, who was a member of the commission who prepared the code which was adopted by the legislature of New York in 1848. Almost as prominent, and fully as ardent, in this work has been Samuel Maxwell, for the past twenty-two years an honored justice of the supreme court of Nebraska. As a non-resident lecturer upon code pleading and practice in nearly all the principal law schools in the country he has taught the principles of law reform to many of the new recruits in the profession, and imbued them with some of his own enthusiasm in the work. It was the privilege of the writer to hear the advance sheets of a considerable portion of this work read by the author, and to hear from the lips of the venerable jurist the words which "cold type" can so inadequately convey. In a personal letter the author says: "The bar and people of Michigan would be greatly benefitted by the adoption of a code. It would materially lessen the labor of lawyers in the preparation of pleadings and entries by stripping away the needless verbiage that encumbers them. It would do away with the distinction between law and equity and permit the court in one action to settle all matters in controversy between the same parties which belong to the same class or arise out of the same transaction. The procedure is simplified, business in court expedited, the rights of parties protected and enforced, and justice administered without denial or unnecessary delay, and materially reduces the ultimate court fees in each case."

No man living is better qualified to write a work upon the code. The work has already gone through several editions. It is complete in one handy volume of 872 pages, of which 350 are devoted to forms and directions in all classes of cases. This feature is alone worth the price of the book. We hope every lawyer in Michigan will read it carefully before passing judgment upon the question of codification.

JARMAN ON WILLS.—A Treatise on Wills, by Thomas Jarman, Esq. The Fifth Edition, by Leopold George Gordon Robbins, Esq., of Lin-

coln's Inn, Barrister-at-Law. Sixth American Edition, by Melville M. Bigelow. Boston: Little, Brown and Company.

Almost fifty years ago (December, 1843) the first edition of the crowning work of Thomas Jarman's life was published. Since then his name has been inscribed among the foremost of legal authors, and given one of the places of honor upon the shelves of every well-appointed law library. In this fifth edition the English editor has made such changes as the lapse of twelve years since the last edition has made necessary. Some of the text, particularly that which referred to the law of wills previous to the Act of 1837, has been omitted, and reference made instead to the places in the fourth edition where the discussion of these doctrines can be found if ever desirable. This has afforded space for the new matter gained from the decisions of the past twelve years. The mechanical construction of the work has been greatly improved. The several chapters have been divided into sections and sub-sections, with appropriate headings printed in distinctive type. This not only gives it a more modern appearance, but also facilitates reference. The parts of the work by the several editors are so arranged as to be easily distinguished from that of Mr. Jarman. In this sixth American edition, among the features most prominent to the readers in this country are the excellent notes by Melville M. Bigelow, the eminent Boston lawyer and author. Dr. Bigelow has entered into the work with an ardor only equalled by that of Mr. Jarman himself. Throughout the work of both are the evidences of long study, careful preparation, and a vast amount of original research. These American notes are of themselves of inestimable value, being monographs upon a great variety of subjects nowhere else treated. Among the more exhaustive notes are those upon testamentary capacity, undue influence, gift over of "what remains," and life estate with power of sale. Among the shorter but no less interesting notes are those upon mutual wills, revocation (both by marriage and by burning, tearing or obliterating), uncertainty, conditions in restraint of marriage, construction of gifts to the "heir," and enlargement of estates. The notes upon estates of trustees under the "Statute of Uses," and the liability of a decedent's estate for his debts, are also worthy of special mention. The last chapter is of great practical value, being a compilation of the general rules of construction. In "Appendix A" are given suggestions to persons taking instructions for wills, including wills intended to operate abroad.

The work is internationally copyrighted under the new law. It is handsomely bound in two large but compact volumes. The actual number of pages of text is 1664, the tables of contents occupy 42, the tables of English and American cases 192, while 144 pages are filled by a very complete and comprehensive index, a feature always to be admired in a law book. It is unquestionably the finest and most complete work on the subject in existence. No other author has attempted to treat the subject so exhaustively. With these two volumes before him, one may justly imagine himself in the midst of a great library upon the subject. Whatever he looks for is there, and can easily be found. So far as can be seen now it will probably continue to occupy its high position among law books for many more half-centuries.

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THE LAW OF BILLS AND NOTES UNDER MICHIGAN DECISIONS.*

F. W. STEVENS.

In 1875, Justice Cooley said that "the beauty and value of the rules governing commercial paper consist in their perfect certainty and reliability." *Bank v. Burkham*, 32 Mich., 338. At that time only a small portion of the numerous cases upon this subject had arisen. There had been no "Bohemian oats" nor "Red lyon wheat" schemes to test the "certainty and reliability" of the rules, and tend to induce departure from principle. A perusal of this paper, if it serves no other purpose, will enable the lawyer to determine whether there has been such departure in respect to any branch of this subject. It is the purpose of the writer to include in this paper the substance of all Michigan decisions which belong to the subject of bills and notes, to and including volume 91 of the Michigan reports. The writer acknowledges having experienced some difficulty, however, in determining whether certain cases properly belong to this or to other subjects.

I. REQUISITES OF NEGOTIABLE PAPER.

What will, and what will not, destroy negotiability? In general, the requisites of a promissory note are, that it be an absolute, unconditional, written promise to pay a specified sum, at a certain time, to the payee named, or to his order, or to bearer. How. Stat., Sec. 1577. *Fralick v. Norton*, 2-130. A bill of exchange differs only in the fact that it is an order or request to pay, and most of the rules applicable to promissory notes equally affect bills of exchange. If the instrument lack any of the qual-

* This article will be concluded in the June number.

ities enumerated, it is merely a simple contract. A consideration is then no longer implied, the legal title is no longer transferable by simple endorsement and delivery, and the purchaser acquires the same subject to all equities existing between the original parties.

In *Smith v. Kendall*, 9-241 (Campbell, J., in a lengthy opinion dissenting), it was decided that the addition of the clause "with current exchange on New York" does not render the amount uncertain, nor impair negotiability. The same question was raised in *Johnson v. Frisbie*, 15-286, and the ruling above was affirmed, Justice Campbell delivering the opinion and generously following the first case. For the same reason a provision for the payment of express charges does not change the character of the instrument. *Bullock v. Taylor*, 39-137. So, a note or certificate of deposit payable "in current funds," and one made and endorsed in Michigan and payable in Canada "in Canada currency" are negotiable, because in each instance the paper would be so payable without such clause. *Phoenix Ins. Co. v. Allen*, 11-501; *Phelps v. Town*, 14-374, *Black v. Ward*, 27-191. A mere statement in a note of the property for which it was given will not destroy its negotiability, but, otherwise, if it contains a condition that if not paid when due the property shall belong to the payee. *Wright v. Traver*, 73-493. Where a note draws one rate of interest if paid at maturity, and a higher rate from its date if paid after maturity, and provides also for the payment of exchange and expenses of collection including attorneys' fees, it is not negotiable, but is "relegated to the domain of ordinary contracts." *Cayuga Bank v. Purdy*, 56-6.

Upon the theory that the element of certainty in amount requisite to negotiability, must continue until the obligation is discharged, it has been decided that if to the amount to be paid is added "and attorney fees" it prevents the instrument from being negotiable at all. *Altman v. Rittershofer*, 68-287; *Altman v. Fowler*, 70-57. Up to the the time of these decisions in 1888 this last question was an open one, there being a conflict of opinion in the other states. It was long before decided that a provision in a promissory note for the payment of attorneys' fees was absolutely void and nugatory (*Bullock v. Taylor*, 39-137; *Myer v. Hart*, 40-517) and it would seem that if void, it should not have been held to destroy negotiability by rendering the amount uncertain. (So held by Judge Taft of the circuit court of appeals, *Bank v. Sutton*

Co., 52 Fed. Rep., 191.) In *Wright v. Traver*, 73-493, the question was raised whether a stipulation for a fixed attorney fee of ten per cent. would destroy negotiability. It was again held that such a provision was void, but the question whether, being void, it destroyed negotiability was passed.

If the note contains authority for a confession of judgment for principal, interest and costs, it is not negotiable. *Brewing Co. v. McKittrick*, 86-191. So, if the time of payment is dependent on the completion of a house to be built by the payee, maturity is uncertain, and obviously the instrument is not negotiable. *Chandler v. Cury*, 64-237. And where a paper provided for the payment of a fixed sum, at a fixed time, with interest at seven per cent. to maturity and eight per cent. after maturity, "without relief from homestead, valuation or appraisement laws," and contained a waiver by the makers and endorsers of presentment and notice of non-payment, and a waiver by sureties of any release on account of an extension of the time of payment,—the court held it to be a simple contract. *Bank v. Wheeler*, 75-546.

A bank certificate of deposit, in the usual form, payable "on return of this certificate properly endorsed" is in legal effect a promissory note payable on demand, and is governed by the rules applicable to such notes. *Tripp v. Curtenius*, 36-494. And a provision in such a certificate that it shall draw interest, "if left three months," does not, it was held, render the amount uncertain. *Cate v. Patterson*, 25-191.

An instrument signed officially by the officers of a corporation, requesting its treasurer to pay K. or bearer a certain sum, was held to be in legal effect a promissory note, no acceptance being necessary. *Hasey v. White Pigeon Co.*, 1 Doug., 193.

Purely nugatory clauses have generally been held not to affect negotiability. As, if the consideration be stated, *Beardslee v. Horton*, 3-560. Or if "secured by mortgage" appear on the note *Howry v. Eppinger* 34-29 or if the note purport to be according to the conditions of a mortgage and the terms of the mortgage correspond with those in the note, *Littlefield v. Hodge*, 6-326. But if the mortgage makes the payment conditional, the note is not negotiable. *Goodenow v. Curtis*, 33-505. The addition of the words "or heirs" after the payee's name is held not to impair negotiability; *Knight v. Jones*, 21-161. And a note payable to the "order of J. V. Mehling estate" and endorsed by the sole legatee who was also executrix was held valid and payable to

the proper representatives of the estate. *Peltier v. Babillion*, 45-384.

It is settled that a promise to pay "on or before" a day named is sufficiently certain as to time, as no right of action accrues until the day named. *Carrier v. Cameron*, 31-373; *Helmer v. Krolick*, 36-371.

If the instrument, though in all other respects in conformity to the rule, contain an agreement to accept less than the amount named, or the principal without interest, if paid at some other time than maturity, its negotiability is destroyed, because it lacks certainty in time and amount. Such an instrument is transferable only by assignment and a mere endorser is not liable, though the assignment may be by endorsement. *Fralick v. Norton*, 2-130; *Wait v. Pomeroy*, 20-425; *Lamb v. Story*, 45-488; *Story v. Lamb*, 52-525; *Brooks v. Hargreaves*, 21-254. The same may be said of a note providing that the payee or his assigns may indefinitely extend the time of payment. *Smith v. VanBlarcum*, 45-371. The addition of a seal to the signature of a note has been held to destroy its negotiability, because the period of limitation is enlarged to ten years. *Rawson v. Davidson*, 49-607.

A promise to pay a stated sum "to be paid 20 per cent. a month from July 1, 1871" was held a negotiable promissory note. *Wright v. Irwin*, 33-32. But where in an instrument the payment of annual interest was made dependent on the promisor's convenience and a stipulation was inserted to take other security in exchange for the note, the instrument was properly held to be only a simple contract. *Humphrey v. Beckwith*, 48-151.

II. VALIDITY, EXECUTION AND DELIVERY.

Married Women's Notes. It is a matter of surprise to many people to be told that a married woman, no matter how responsible she may be, cannot become surety for another or be forced to pay a note which she has signed alone or with others, unless it pertain to her own separate property. This state of the law is thought to be a reflection upon the courts, but the fault lies with the legislature only, which may easily remove the contractual disabilities of married women that still remain. The fact that married women are classified with infants, idiots, etc., in this regard, is also sometimes commented on by married women themselves, as an example of the manner in which their rights are withheld. It must be remembered, however, that the law does

not prohibit married women from voluntarily *paying* any notes they may sign, and that had they not seen fit to come under the shelter of the law, as it is, the numerous cases soon to be cited would not have arisen. It has repeatedly been held that a married woman cannot be held as surety on a promissory note, and that the note of a married woman is void as to her, unless given for her separate estate. This is because the statute removing the contractual disability of the common law extends only to her separate estate, and the common law, therefore, is in force regarding contracts not concerning her separate estate. *DeVries v. Conklin*, 22-255; *West v. Laraway*, 28-464; *Emery v. Lord*, 26-341; *Ross v. Walker*, 31-120; *Jenné v. Marble*, 37-319, 324; *Kitchell v. Mudgett*, 37-81; *Carley v. Fox*, 38-387; *Rickle v. Dow*, 39-91; *Russell v. People's Bank*, 39-671; *Gartz v. Tolles*, 40-725; *Kenton Ins. Co. v. McClelland*, 43-565; *Schlatterer v. Nickodemus*, 51-626; *Barnes v. Brown*, 32-146; *Littlefield v. Dingwall*, 71-223. Such notes, even if negotiable, have no greater validity in the hands of *bona fide* holders than in the hands of payees. *Johnson v. Sutherland*, 39-579; *Waterbury v. Andrews*, 67-281. In order to hold a married woman on any note, there must be an affirmative showing that it was directly for the advantage of her separate estate. A legal consideration will not be presumed. *Russell v. Bank*, *supra*; *Fechheimer v. Pierce*, 70-440.

The note of an *infant* is voidable and can be ratified only after majority. *Minnock v. Shortage*, 21-304, except, it may be added, when the note is given for necessities.

One may be held as sole maker where he signs a note with another who is incapable of making the contract; as, where he signs with an infant, *Taylor v. Dansley*, 43-82, or with a married woman to a note not concerning her separate estate. *DeVries v. Conklin*, 22-255.

A note made by an intoxicated person is not always void. The defense must rest on fraud, not incapacity, as mere intoxication is not a defense, if the maker was aware of what he was doing. *Miller v. Finley*, 26-249.

Sunday Notes.—The invalidity of notes made on Sunday is only implied from the general prohibition of Sunday business. Howell, Sec. 2015. A note made and delivered on Sunday is void; *Adams v. Hammell*, 2 Doug., 73, but if signed on Sunday and not delivered until a week day and then taken by the payee without knowing that it was signed on Sunday, it is a valid note. *Vinton*

v. Peck, 14-291; *Hall v. Parker*, 37-594; *Beman v. Wessels*, 53-549. It will be seen also, that a note made on Sunday will be enforced when in the hands of a *bona fide* holder without notice. *Vinton v. Peck*, *supra*, and in a suit on a foreign note made on Sunday, the statute invalidating it must be proved, in order to make that a defense, as at common law such notes are not void. *O'Rourke v. O'Rourke*, 43-58.

Illegal Consideration.—The statute makes void all bills and notes the consideration for which, in whole or in part, is money won at gaming or lent for gaming, except as to those who hold in good faith. Howell, Sec. 2027. And a bill or note is void if part only of the consideration is the discontinuance of criminal proceedings. *Wisner v. Bardwell*, 39-278; *Snyder v. Willey*, 33-483.

Execution.—The instrument may be signed by the maker himself, by writing his name or by making his mark, *Brown v. McCormick*, 28-217, or some other person may sign for him in his presence and by his direction. *Sager v. Tupper*, 42-605; *Coy v. Steiner*, 53-42.

Delivery.—In order to give effect to a promissory note or a bill of exchange, it must be *delivered* by the maker or drawer, as the case may be. While possession by the payee or indorsee is *prima facie* evidence of delivery, if it appear that the paper has never actually been delivered and that it was put in circulation by force or fraud, and without any confidence or fault on the part of the maker, there has been no such delivery as will entitle even a *bona fide* holder to recover upon it. *Burson v. Huntington*, 21-415. And where a party unwittingly signed an instrument in the form of a note relying on false representations that it was something else, under circumstances void of negligence on his part, and hands it over in ignorance of its true character, it was held to be no delivery, and the instrument was regarded as a forgery, even as to *bona fide* holders. *Gibbs v. Linabury*, 22-479, followed by *Anderson v. Waller*, 34-113. The circumstances of issue and delivery are always open to explanation between the *original* parties. *Smith v. Van Blarcum*, 45-371, so the question always turns upon whether the maker has been so grossly negligent as to preclude the defense against a *bona fide* holder. *Sofer v. Peck*, 51-563. See further, the cases cited under the head of "Bona Fide Holders," *post*. If one of two joint makers delivers the note, it is conclusively presumed that he had authority from the other to do so; *Beman v. Wessels*, *supra*, and in a suit against one of

several makers of a joint and several note, it is not necessary to prove the execution by the makers not sued. *Chandler v. Lawrence*, 3-261.

III. PARTIES TO NEGOTIABLE PAPER.

Joint Makers.—One of the early questions which arose for decision concerned the liability of one who placed his name upon the back of a note at its inception and before delivery. The conclusion reached differs from that of the courts of some other states. An early case upon the question is *Weatherwax v. Paine*, 2-556, where two persons who signed on the back of a note at its making and before delivery to the payee, were held as joint original promisors with the one who signed on its face. The doctrine of this case has undergone some modification by many later decisions, but has never been overruled. *Rothschild v. Grix*, 31-150; *Freeman v. Ellison*, 37-459; *Herbage v. McEntee*, 40-337; *Smith v. Long*, 40-556; *Sibley v. Bank*, 41-227; *Moynahan v. Hanaford*, 42-329; *Robbins v. Brooks*, 42-62; *Fay v. Jenks*, 78-312; *Treadway v. Antisdcl*, 86-82. From the cases cited the rule may be stated thus: One who backs a negotiable instrument, payable to the order of a third person, at its inception and before it has been uttered, or any advance made upon it, and before the payee has endorsed it, becomes as to the payee and subsequent holders an original joint promisor and bound as principal and maker; but a *subsequent* endorsement does not create the liability of a joint maker; unless, as held in *Sweet v. Woodin*, 73-393, the subsequent endorser writes his name *above* the payee's endorsement, the payee being an accommodation endorser. Nor is joint liability presumed when the signature on the back is not dated; it is established only by independent proof of contemporaneous execution. Such parties are not endorsers. No one can sustain the relation of an endorser except there be some one in being possessing the correlative relation of indorsee; *Gibson v. Miller*, 29-355, and in the case of a note payable to the order of a payee, no third person can become an endorser until the payee has endorsed it. *Smith v. Long*, *supra*. No distinction is made here in this regard, as in New York, between negotiable and non-negotiable paper. *Rothschild v. Grix*, *supra*. But although such a party is not discharged by failure to present and give notice of dishonor, yet an extension granted without his knowledge or consent will discharge him, provided the payee or holder had notice or knowledge that as

between the makers, he was a surety. *Gano v. Heath*, 36-441; *Baron v. Cady*, 40-257, citing *Smith v. Sheldon*, 35-42. In a recent case, *Aullman v. Gorham*, 87-233 it was held that a joint maker cannot reduce his liability to that of an endorser by parol testimony that it was agreed when he signed the note that he should have immediate notice of non-payment. Nor can a payee, who, when he sells the note signs it below the maker's name, at the purchaser's request, avoid the liability of a maker, by evidence that he signed as an endorser. *Cook v. Brown*, 62-473. The mutual rights and liability of the parties are determined by their respective positions on the paper when negotiated, and where there is no ambiguity upon its face, parol evidence is not admissible to change the liability as it appears by the paper. *Greusel v. Hubbard*, 51-95; *Finan v. Babcock*, 58-301; *Cook v. Brown*, 62-479; *Brewer v. Boynton*, 72-254; *Sweet v. Woodin*, 73-395. But this rule does not prevent one who signs a joint and several note as a maker from showing by parol evidence that the holder knew that he was in fact a surety, and claiming a release by reason of an extension of time granted to his co-maker, without his consent. *Stevens v. Oaks*, 58-343. And see *Farwell v. Ensign*, 66-600, cited under the subject of "Endorsers."

A joint maker who writes "surety" after his name, does not thereby limit or change his liability, so that the holder is required to comply with a request of such surety to proceed against the other maker. *Inkster v. Bank*, 30-143. His proper course is to pay the note and proceed against the principal himself for money paid to the latter's use, which he may do even after his own liability has been barred by the statute of limitations, provided his principal has kept it alive against himself. *McClatchie v. Durham*, 44-435. Such a word appearing after the name of the maker would undoubtedly serve one purpose, however. It would give notice to the holder that he must not release security or extend the time of payment without "surety's" consent.

Endorsers.—An endorser of a bill, note or certificate of deposit, contracts that the paper and the signatures are genuine, that all previous endorsements were duly made, that when due the maker or acceptor will pay it on presentment, and if not so paid he will, on due notice, pay it himself. *Fish v. First Nat. B'k.*, 42-203; *Atwood v. Cornwell*, 28-336, 340; *Aniba v. Yeomans*, 38-171; *Cate v. Patterson*, 25-191. He is estopped from denying the genuineness of the paper, and if it appears that a previous endorse-

ment is invalid, he is not thereby released. The purchaser need not look beyond the signature of the last endorser unless he has notice of facts that should put him on inquiry. *Fish v. Bank, supra*. An endorsement also implies that it was made for a valuable consideration. *Newberry v. Trowbridge*, 13-263. It has been seen that one who signs on the back of a note may become a joint maker; but a payee so signing never becomes a joint maker. Whether he so signs at the execution of the paper or afterwards, and whether it be accommodation paper or not, he becomes an endorser and is chargeable in no other capacity, unless he add words limiting his liability. *Smith v. Long*, 40-555; *Stewart v. First N'l. Bank*, 40-349; *Newberry v. Trowbridge*, 13-263.

If an endorsement be in blank, the holder of the paper may at any time insert above it his own name as indorsee; *Brown v. McHugh*, 35-50, or he may strike out late endorsements and sue a remote prior endorser. *Reading v. Beardslee*, 41-123, on the contract of that endorser with his immediate endorsee. *Kinzie v. F. & M. Bk.*, 2 Dougl., 105.

The last of several successive endorsers may, if he has paid the note, recover in full from the maker and prior endorsers. Successive endorsers, even if they are accommodation endorsers, are not sureties for each other so as to be liable to contribution. *McGurk v. Huggett*, 56-187. But it is held that there may be exceptions to this rule, and that they may be established by parol evidence, as, that the endorsers were not only accommodation endorsers but by an agreement among themselves co-sureties. *Furwell v. Ensign*, 66-600.

It was held that an endorsee who knows that his endorser signed merely for the accommodation of the maker, loses his right of action against such endorser by proceeding to judgment against the maker and levying on the maker's chattels, *F. & M. Bank v. Kingsley*, 2 Dougl., 379, and that one who signs on the back of the note below the name of the payee, being liable only as a subsequent endorser and not as a joint endorser, is discharged by the release of the payee without his consent. *Brewer v. Boynton*, 72-254.

An endorsement for collection, so common in commercial transactions, passes no title to the endorsee as against the endorser, *Sutherland v. First Nat'l Bank*, 31-230; *Locke v. Leonard Silk Co.*, 37-479, and the endorser may on suing strike out the endorsement for collection as well as the endorsement back to him. *Read-*

ing v. Beardslee, 41-123. But an endorsement for collection gives the endorsee, even if a mere collecting agent, the right to sue the maker and prior endorsers in his own name, *Brigham v. Gurney*, 1-349; *Hovey v. Sebring*, 24-232; *Boyd v. Corbitt*, 37-52; *Lobdell v. Bank*, 33-408, but subject of course, to all defences existing against this endorser; *Wintermute v. Torrent*, 83-555; *Coy v. Steiner*, 53-42,, and such authority to sue is not revoked by the death of the endorser. *Moore v. Hall*, 48-143.

The cases on the subject of presentment, protest and notice of dishonor will be referred to later.

Guarantors.—The contract of a guarantor, aside from its form, differs from that of an endorser principally in the matter of presentment and notice of non-payment. While an endorser is absolutely discharged by a failure to present at maturity and give immediate notice of dishonor, whether he has suffered by the want of notice or not, a guarantor is discharged only upon a showing that he has suffered a loss or damage by the holder's failure to demand payment of the maker and give notice of dishonor, *within a reasonable time* after maturity, and what is a reasonable time depends upon the circumstances of each case. No general rule can be stated. Upon proof of loss (which generally arises from the maker's becoming financially irresponsible between the time of maturity and the time when notice of non-payment is given to the guarantor) he will be discharged *pro tanto*. As a rule, the holder has a right of action against the guarantor of payment as soon as the person whose obligation is guaranteed fails to pay. See *F. & M. Bank v. Kercheval*, 2-504, where the authorities upon the subject are reviewed.

Whether a guaranty of payment is endorsed on the back of a note contemporaneously with its execution, or subsequently thereto, the guarantor does not become a joint maker, as does one who merely places his name on the back of a note. The contracts of the maker and guarantor are separate and distinct. *Tinker v. McCauley*, 3-188. overruling *Higgins v. Watson*, 1-428. But in the case of a subsequent guaranty some new consideration is necessary to support it, as in the case of a subsequent accommodation maker *Freeman v. Ellis*, 37-459; *Kulenkamp v. Groff*, 71-675.

The case of *Tinker v. McCauley*, *supra*, held also that guaranties of payment or collection were not negotiable; but a statute passed subsequently to that case, Howell, Sec. 1590, provides that such guarantees shall be negotiable to the extent that an assign-

ment, endorsement or transfer of a note having such a guaranty shall give the holder a right of action in his own name, but subject to all equities. See *Waldron v. Harring*, 28-493, holding that the statute dispenses with the necessity of such allegations concerning the assignment as are necessary in the case of paper not negotiable. A guaranty need not contain the name of the promisee. A guaranty in blank, if made by the owner of the paper passes title. It becomes fixed whenever anyone takes it upon the guarantor's credit, and notice of reliance on the guaranty need not be given. *Nevius v. Bank of Lansingburg*, 10-547; *Comstock v. Howd*, 15-237, 243; *F. & M. Bank v. Kercheval*, 2-504; *Phelps v. Church*, 65-231. It has been held that guaranties are not within the statute of frauds. *Jones v. Palmer*, 1 Dougl., 379; *Thomas v. Dodge*, 8-51.

The contract of the *guarantor of collection* is quite different from that of a guarantor of payment. Before the holder of a note can proceed against a guarantor of collection, he must obtain a judgment against all the makers, take out an execution and have it duly returned unsatisfied. If a mortgage secures the note, he must exhaust the remedy so given. *Barman v. Carhart*, 10-337; *Johnson v. Shepard*, 35-115; *Schemerhorn v. Conner*, 41-374. The declaration in a suit against the guarantor of collection must show that the necessary legal proceedings have been taken against the maker without effect. *Bosman v. Akeley*, 39-710. And a finding of the court that shows an apparent exhaustion of legal remedies but does not describe or identify the note, or show the owner, or that the plaintiff is still holder, is not sufficient to support a judgment. *Gray v. Pike*, 38-650. A guarantor of collection was held discharged where the holder refused to receive payment when offered by the maker and delayed collection until the maker had failed. *Sears v. Van Deusen*. 25-351.

A third person's verbal statement that a note offered by a purchaser is "as good as gold" was held not to amount to a guaranty of collection merely, so as to require an exhaustion of remedies against the maker of the note before an action for breach of verbal warranty could lie. *Taylor v. Soper*, 53-96.

A guaranty of "costs of collection" covers only definite taxable costs. *Weatherbee v. Kusterer*, 41-359.

A guaranty of either payment or of collection, endorsed on a note by the payee, passes title, and the note will thereafter pass by delivery. *Green v. Burrows*, 46-70; *Russell v. Clink*, 53-161.

CONSTITUTIONAL RIGHT OF PROTEST.

JAMES D. TURNBULL, RELATOR V. J. WIGHT GIDDINGS AND
DENNIS E. ALVORD.

THOMAS E. BARKWORTH, RELATOR V. WILLIAM A. TATEUM AND
LEWIS M. MILLER.

Michigan Supreme Court, April 14, 1893.

The president and secretary of the senate and the speaker and clerk of the house of representatives are not proper parties defendant in an application for a mandamus to compel the receiving and spreading, upon the journals of the senate and house of representatives respectively, of protests against certain proceedings of those bodies, offered by members of the legislature in accordance with section 10, article IV, of the constitution of the state of Michigan.

The duty sought to be enforced is imposed by the constitution upon the senate and house, and those bodies having refused to receive or enter the protest, neither the president of the senate nor the speaker of the house has power, without the concurrence of the body over which he presides, to execute the order if made.

Attorney General A. A. Ellis and Thomas E. Barkworth, for relators.

Thomas M. Cooley, for respondents.

McGrath, J.—These cases may be considered together. The relator in the first case is a member of the senate. Respondent Giddings is lieutenant-governor and ex-officio president of the senate, and respondent Alward is the secretary of the senate.

The relator in the other case is a member of the house of representatives. Respondent Tateum is also a member of the house and speaker thereof, and respondent Miller is clerk of that body.

Senator Turnbull, on the 15th day of February, 1893, asked leave to present a protest against certain proceedings of the senate and to have the same spread upon the journal, but the president of the senate, respondent Giddings, ruled that the protest offered was out of order as reflecting on the honor of the senate. The decision of the president was appealed from, on the ground that the ruling "was contrary to the constitutional guarantee." Upon vote taken the ruling of the president was sustained.

On Feb. 9, 1893, during a session of the house of representa-

tives, the relator in the second case, Representative Barkworth, presented his protest against the passage of a certain resolution, but the speaker, respondent Tateum, declared the protest to be out of order, as reflecting on the house and refused to receive or print the same in the journal. Mr. Barkworth appealed from the decision of the speaker on the ground that the ruling was "contrary to the constitutional guarantee." Upon a vote had by yeas and nays, the decision of the speaker was sustained. On March 3, following, Mr. Barkworth re-offered his protest, but the speaker repeated his rulings and the same was not received, and thereupon Mr. Barkworth requested respondent Miller to receive said protest and print the same as a part of the journal, but said Miller, relying upon the decision of the said speaker of the house, refused and neglected to receive the protest.

Orders to show cause were issued, and respondents appear without answer and move to dismiss the proceedings.

The motion to dismiss must be granted.

Section 10 of article IV of the constitution provides that each house shall keep a journal of its proceedings and publish the same, except such parts as may require secrecy. The yeas and nays of the members of either house, on any question shall be entered on the journal at the request of one-fifth of the members elected. Any member of either house may dissent from and protest against any act, proceeding or resolution which he may deem injurious to any person or the public and have the reason of his dissent entered on the journal.

It will be observed that the constitution imposes the duty of keeping the journal upon the house, and not upon the president or speaker, secretary or clerk. In both cases an appeal to the house was taken, and each house adopted the ruling of their respective officers refusing to receive the protests or to print them in the journal. It is true that the rules make it the duty of the secretary and clerk to keep the journal, but this is not a delegation of the control of the journal to either officer. The rules also provide for the reading of each day's journal and the correction thereof. The corrections are made at the instance and direction of the body to which the journal is read. The duty imposed by the rules is a mere clerical duty of placing upon the journal such matter as each house may determine shall be placed thereon. The secretary and clerk are, therefore, the mere creatures of the respective bodies.

It is not sought by this proceeding to reach something which

is in the possession of the agent who defends his possession by setting up title in his principal, nor is it a proceeding to restrain an agent from doing an unlawful act under an order from his principal and who sets up the immunity of his superior. It is not the existence in another of mere interest that is here pleaded. It is affirmative action that is sought to be enforced and it is want of power to comply with or give effect to an order, if made, that is pleaded. It is sought to compel persons whose duties are purely clerical to perform duties which are imposed upon their superiors. We are asked to compel the secretary of the senate and clerk of the house to insert in the journal matter which the senate and house have not only refused to allow to be printed therein, but have refused to consider or receive.

The writ of mandamus neither creates nor confers authority upon the officer to whom it is directed. It merely directs the exercise of existing powers. It should be directed to those who are to execute it or whose duty it is to do the thing required. It must also clearly appear that the person to whom directed has the absolute power to execute it, otherwise it will not stand. *Moses on Man.*, 199; *High Ex. Leg. Rem.*, Sec. 33; *Merrill on Man.* Secs. 57, 58, 60, and cases cited.

The duty sought to be enforced is imposed by the constitution upon the senate and house, and those bodies having refused to receive or enter the protests, neither the president of the senate nor the speaker of the house has power, without the concurrence of the body over which he presides, to execute the order if made. It is unnecessary to discuss the other questions raised. Inasmuch as the proper parties are not before the court, the proceedings must be dismissed and the writs denied, but without costs. The other justices concurred.

NOTE.—The effect of this decision is, beyond all question, that it necessarily disposes of the main question, for there is no process known or conceivable whereby the two houses could be brought before the supreme court or subjected to its authority. The court, after deciding that the respondents did not have it in their power to do what was demanded of them but were subordinate to the two houses and therefore the proceedings must be dismissed, simply added: "It is unnecessary to discuss the other questions raised." They therefore expressed no opinion upon them and we do not know from the opinion whether they even

considered or discussed the main question in the case among themselves. But it is certain that they have settled the case, although their method of doing it was not by a direct solution of the principal contention.

The editors of this JOURNAL have received a printed copy of the notes from which Judge Cooley made his argument. It is to be regretted that it cannot be printed in full, there is so much in it which is valuable and worth preserving. It would be impossible to condense the argument and do it full justice. Therefore, as Judge Cooley does not know to what extent the use of any part of his argument is desired, he thinks it well to say that among other things he said in substance as follows:

I make no criticism whatever upon those cases in which it has been held that *mandamus* will lie to compel the performance of ministerial acts by high officers of state. The question is not one of the grade of office but of the nature of the power, and the whole doctrine is wisely stated in *Marbury v. Madison* (1 Cranch 137) where it is said that the performance of executive duties cannot be controlled by the judiciary. Neither do I question the right to compel the speaker of a legislative body to give certificates of attendance to members when the law provides for it. This is no legislative act. The law might instead have provided that the certificate should be given by the sergeant-at-arms or door keeper. That the act in question here is legislative is beyond dispute. Why the record as made up enters into the very substance of legislation. You may determine from it whether a law has been legally passed. If the record does not show that the constitutional steps have been taken it may be held void notwithstanding it has the signatures of the presiding officers and the approval of the governor; and yet is it to be held that this record can be made up by some other tribunal than the house itself, and upon affidavits? If it is, that tribunal is to that extent the law making power and it may validate that which by the record appears invalid or invalidate that which appears valid, and do this upon affidavits,—perhaps conflicting affidavits. Now when the supreme court does this, how can it be said that it is not performing duties in another department of government which the constitution has not authorized it to perform? The legislature is dominated by that act.

The record is not only to be made up by each house for itself, but each house must have a discretion in making it up. That I

have already taken pains to show, but it appears perhaps more distinctly than any where else in what is done in respect to debates. There is no claim here that it is imperative that the debates shall be fully shown by the record, and yet they constitute not only a part of the proceedings, but a most valuable and important part. Legislation would be imperfect without it and legislators would often be proceeding in the dark.

In concluding he said: "In all this discussion I have undertaken to express no opinion whatever in respect to the merits of the controversy out of which these proceedings have grown. I have not discussed them because I consider them foreign to what is before this tribunal. In this place we are to expect that the landmarks of constitutional government will be observed and guarded, and if, in other parts of the capitol, officials shall abuse their powers, the people of Michigan must be relied upon to deal with them according to their deserts, but in constitutional methods."

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Address all correspondence to MICHIGAN LAW JOURNAL, Grand Rapids, Mich.

MR. F. W. STEVENS, who contributes an exhaustive discussion upon "The Law of Bills and Notes Under the Michigan Decisions," to this number, is the junior member of the firm of Smiley, Smith and Stevens of Grand Rapids. He was assistant United States district attorney for the western district of Michigan from February 1890 to January 1892. He graduated from the law department of the University of Michigan with the class of 1887. His article will be found of practical value, since it is complete to date.

WAYNE COUNTY has just elected four circuit judges. Judge Hosmer was the only one re-elected from the old bench. While the judges who have filled the bench of Wayne county may not be to blame, the fact nevertheless is notorious, that the system, or rather no-system, of calling cases and dispensing justice in the Wayne circuit, is almost the worst in the State of Michigan. This is partly accounted for by the fact that no certain rule is prescribed to regulate the order in which cases are to be taken up, and, moreover, attorneys often have cases on call at the same time before different judges. As a result of these, and other faults, familiar to the bench and bar alike, confusion and uncertainty reign as the chief characteristics of the court docket. An effort is now making to increase the number of judges, for the ostensible purpose of curing these evils, but really the reason is found in the ambition of certain parties, and their friends, to secure a seat on the judicial bench. That individuals, in any profession, should be actuated by such motives is not so surprising, however to be deplored, but we would be slow in believing that any considerable number of the Detroit Bar could be induced to lend their aid to further such a scheme. We are of the opinion that Wayne county needs to systematize her methods of transacting

legal business more than she needs an extra judge, and this opinion agrees with the opinion of the best lawyers in the county. Herein other counties may also find profitable reading.

THE importance of the question of the adoption of a code in Michigan, may be inferred from the prominence given the subject by the Michigan State Bar Association. At the next meeting three papers will be read bearing directly upon this question, and a summary of the arguments on both sides will be presented. Such a discussion will have all the significance of a regular code meeting, for if the merits of both systems, the code and common law, be contrasted, the advantages of the code may be appreciated. Here will be offered an opportunity for comparing the two systems, and comparison is the process by which opinions are formed. Surely the time has even now come when every member of the bar of Michigan is expected to have a definite opinion upon this important subject. What opinion you may form does not disturb the advocates of law reform, provided they get a fair hearing. Fairly presented, a candid judge, who is open to conviction, and in sympathy with progress, could not but assent to all the demands of the law reformers, for their demands are conservative. Progress and reform go hand in hand, and cannot be divorced without injury to both.

THE adjustment of sovereignty in this Union,—state rights to the rights of the national government,—has been the greatest problem our people have ever been called upon to solve. Nor did the war finally settle the matter. As great a lawyer as Frederick R. Coudert, who is now representing the American view of the sealing matter, before the arbitration committee in Paris, lately asserted in the *North American Review* that the constitution of the United States is a *treaty*, which raises again the dogma we had hoped perished with Calhoun. In an infinite variety of forms the question arises, but none more interesting than in a case just presented to the United States circuit court for the eastern district of North Carolina. Mr. Alfred Russell, of Detroit, very forcibly represented the federal theory, and argued that the police power of a state does not embrace subjects confided to congress under the commercial clause of the constitution; that an act of North Carolina regulating, or interfering with, the sale of seeds "imported from Michigan in the original packages, is a regulation of interstate commerce, and is void, because the authority to make such a regulation is vested exclusively in congress; and all state legislation operating directly upon interstate commerce, either by way of tax upon its business, license for its pursuit in particular channels, or conditions for carrying it on, is void, for the reason that such legislation regulates commerce, the exclusive power to do which is in congress, and this is so although the legislation also operates on commerce solely within the state, and is princi-

pally intended for the protection of the health and property of the citizens." The case is reported in 52 Fed. Rep., 803 (*In re Sanders*), and should be read by all students of constitutional law.

COAL and ice dealers' combinations were given a set-back in *People v. Sheldon* (N. Y. Sup. Ct., Lewis J.), reported in *Albany Law Journal* (March 11). A complete statement of the case is given in the syllabus: "The retail coal dealers of the city formed an association the main purpose of which was to fix a minimum retail price of coal for the city and vicinity, with the design practically to compel, under prescribed penalties, every coal dealer in the city to join it and regulate his business by its constitution and by-laws, which prohibited soliciting business, except as provided therein, and the taking of club orders of associated buyers at reduced prices, and provided for keeping the retail price of coal uniform, so far as practicable, and required a certain vote of the association to change the price. The constitution also provided that no price was to be made amounting to more than a fair and reasonable advance over wholesale rates, or more than the current prices of the coal exchange of certain designated neighboring cities when figured upon corresponding freight tariffs, and the retail price of coal actually fixed by the association was a fair price. Held, that the association constituted a combination in restraint of trade, and membership in such association would support a conviction on an indictment for conspiracy to commit acts injurious to trade." It is interesting to note that in this case the court conceded the price charged by the combination to be fair and reasonable, but they held it to be the general policy of the law to encourage trade and commerce, and that agreements made to take trade out of the realms of competition are against public policy, even though it may not appear that such agreement did really produce any result detrimental to public interests. In support of this theory are cited *Atcheson v. Mallon*, 43 N. Y., 147; *Santa Clara V. M. & L. Co. v. Hayes*, 76 Cal., 387; *Hooker v. Vandewater*, 4 Den., 349; *Leonard v. Poole*, 114 N. Y., 371; *DeWitt W. C. Co. v. New Jersey W. C. Co.*, 14 N. Y. Supp., 277; and *People v. Fisher*, 14 Wend., 9.

A SPECIAL meeting of the Detroit Bar Association was held in room No. 1, Wayne Circuit Court, on Saturday afternoon, April 15, 1893, at two o'clock. The president, Hon. Geo. V. N. Lothrop, presided, and E. W. Pendleton acted as secretary. The meeting had been called for the purpose of obtaining an expression as to what action, if any, should be taken in the matter of the relief of the supreme court of this state. Levi L. Barbour stated that this matter had been considered at a special bar meeting of the state association, held at Lansing during the past winter and that many different opinions were held by the mem-

bers of the profession and that a resolution was adopted at that meeting favoring an increase in the number of judges of the supreme court. John D. Conely opposed the enlargement of the court to a greater extent than one additional judge. Henry M. Cheever favored the addition of two judges. Jas. S. Pound and Robert Frazer advised that no recommendation be made by the Bar Association.

The following resolution was introduced by John G. Hawley:—That it is the sense of the Detroit Bar Association that it is an impossibility that the present number of judges should dispose of the large and constantly increasing amount of business before the supreme court, and that their number should be increased at once.

The foregoing resolution was supported by Jasper C. Gates. On resolution of Henry M. Cheever, supported by Robert Frazer, the above resolution was amended by the addition of the words "by the addition of two judges." Charles K. Latham opposed the resolution, recommending the method of exclusive jurisdiction of the circuit courts to a certain limited extent. George H. Prentis opposed the resolution, recommending an intermediate court and final jurisdiction in certain cases. A letter from Prof. Levi T. Griffin was read by the secretary, recommending the addition of five judges and the division of the court into two sections, sitting alternately. On motion of Henry M. Cheever, supported by Robert Frazer, the foregoing resolution was laid upon the table. The meeting then adjourned.

STATE BAR ASSOCIATION MEETING.—A notice will be found, on another page, of the third annual meeting of the Michigan State Bar Association, to be held at Lansing, Tuesday, June 6. A program has been prepared which no lawyer, who has allied himself to the profession for other purposes than the mere mercenary and selfish object of making money, can afford to miss. The meeting signals the beginning of a campaign or crusade which we think will eventually result in the codification of procedure and laws in Michigan. According to David Dudley Field, who has done more than any other lawyer to modernize the law in this country, more than one-half the states have abolished the crudities and antiquities of the ancient English methods of administering justice, and have permitted reason to substitute a system which more effectually serves the purposes of this century. The present legal procedure means delay, the code renders litigation simple and speedy. The old methods often deny justice, the code orders every controversy settled with equity. The common law procedure is artificial and subtle, the code is natural, simple and reasonable. The advance of the code in this country has been as irresistible as it has been steady. Its adoption in Michigan is inevitable, but it will probably take time to reconcile the lawyers of the state to the radical change.

The opposition to the code will be found strong and difficult to

break down. Against the code will undoubtedly be found arrayed the most distinguished, the most experienced and therefore the shrewdest attorneys in the state. This fact might as well be faced at the outset. This does not mean, however, that all the brightest, smartest and most learned lawyers will oppose the code. On the contrary as far as actual ability is concerned, the advocates and opponents of this reform will be on an equal footing. Stated in plain Anglo-Saxon, the adoption of a code of civil procedure will be fought only by lawyers who are advanced in years, who have spent the best years of their professional careers practicing under the common law and who are familiar with its every peculiarity, absurdity, and technicality. The adoption of a code means that they will be placed on a footing, in many respects, with the younger members of the bar. Their years will then afford them no handicap over youth. Say what you may, this will be the underlying cause of the opposition to the code, and it can possibly do no harm to say so frankly. To be sure the opponents of codification will ostensibly base their antagonism to a change upon other grounds, such as their ingenuity can "trump up" for the occasion, but the rigid fact remains that their opposition will really arise from an aversion to learning an entirely new system of procedure. It bids fair to be a contest between the younger and older elements of the bar, but we can confidently predict the ultimate success of the younger element because it is marshalled on the side of a reform which means the simplification of the lawyer's work, the cheapening of litigation to the people, and the rendering of justice more sure and speedy.

The Michigan State Bar Association exists for the purpose of promoting legal reforms, and it is eminently proper that the fight for the code be commenced in its sessions. It will be unnecessary, we think, to urge the members of the association, and members of the bar who have not yet allied themselves to the association, to attend the Lansing meeting. There will be other features of the meeting which will interest and instruct, and there is not an attorney in the state too busy to spare a day or two, with this ample notice, at a meeting of his fellow lawyers, where matters of the highest importance to the profession will be under consideration. Stop in the "mad rush" for money and spend a few hours aiding in the advancement of the interests and in the improvement of the condition of the profession, and in pleasant social intercourse with the brethren of the bar. There is a reason for the existence of the state bar association, and it rests with its members to make it a living force and not a devitalized body, a lifeless organization—a mere shell. The third annual meeting will be held at Lansing on Tuesday, June 6.

THE COUNTRY LAWYER.—Our readers outside the large cities will be particularly interested in reading the eloquent and witty response to the toast, "The Country Lawyer," by the Hon.

James A. Connolly, of Springfield, Ill., at the recent banquet of the Illinois State Bar Association in that city. The speech is reported in full in the *Chicago Legal News* of March 4:

As there may be differences of opinion concerning the limitation of the subject assigned to me, I will assume that it relates to all but metropolitan lawyers, inasmuch as it is the fashion of the day to speak of the country as including every place outside the boundary line of the metropolis. While the country lawyer might be classically termed "Rusticus," yet if we take him as a class he will be found anything but a rustic cuss, when it comes to a dexterous use of the "nice, sharp quilllets of the law." * * * His office may not be swept and dusted daily; the horn books on his shelves may not be bright and clean as in the library of his city brother, and smart, clean volumes of reports and digests may not be so numerous, but what are there look like old soldiers just returned from a long campaign—they have seen service. While Hale, Coke, Blackstone, Chitty, Stephens, Story, if they could return, would feel like unnaturalized foreigners in the office of his metropolitan brother, they could drop into the country lawyer's office and feel at home, for they would find the cream of their life work holding the place of honor on his book shelves, and their names household words. * * * The country lawyer is a ruminant animal. He don't swallow his legal food hastily, but he walks into the rich pasture fields of the horn books, knee deep, and filling himself retires to chew it over and over, until healthy digestion enables him to assimilate it, and make it a part of himself. * * * According to Darwin, it took a long time for the process of evolution to "evolute" the tails off our ancestors, so that their descendents might comfortably wear fashionable trousers, but the process of evolution works more rapidly on the country lawyer, and often, when we find a metropolitan brother winning all the races on the kite-shaped track of a metropolis, until he attracts the world's attention, when the world looks up his pedigree and training, it finds him, as a colt, putting on legal muscle by nibbling the short, stubby grass of jury trials around the primitive courts of country justices.

Such early feed, in the legal pastures of the country gives wind and mettle to the legal racer, and makes him a thoroughbred, as surely as the limestone soil and blue grass of Kentucky, or the ozone of California gives it to the equine thoroughbred. And when, in his maturer years, he wins the metropolitan races, he forgets the plaudits which greet him, while his thoughts turn back with pleasure to the scanty country pasturage of his early days, wherein he had to hustle from "early morn till dewy eve," for a living. With the country lawyer the law is still a profession, while with his metropolitan brother, it is a business at all times, except when attending bar associations.

Bar associations are a modern institution. They are an inno-

vation upon the established ways of our professional fathers, and the country lawyer takes to innovation very slowly. Indeed, it looks as though it would take the country lawyer as long to get in the way of attending bar associations as it did to work the tails off our ancestors. * * * The country lawyer is an eclectic, while his metropolitan brother is fast becoming a homeopath, dealing in specifics and specialties. In the broad field of equity the country lawyer roams confident and at ease, armed with all the weapons of full and even justice, while his metropolitan brother rarely ventures into these fields unless preceded by an injunction, which he relies on as often and as implicitly as the darkey does on his rabbit foot. * * * Metropolitan law colleges are factories that turn out keen polished pocket knives and razor blades. Country law offices are factories that turn out broad axes. When comes the conflict between right and wrong the broad axe is better than the pocket knife or razor blade, though not so keen of edge. When truth is to be rescued from the wilderness of falsehood the broad axe is the weapon needed. When the interests of corporations and capital are involved, the smaller, keener, more polished blades are highly effective, but when the life, the liberty or the property of the citizen are assailed, the broad axe is the weapon for their defense. When the foundations for the jurisprudence of a state are to be shaped, the broad axe is indispensable. * * * The country lawyer, by years of calm study, undisturbed by smiles of fortune, years of reflection, of observation and of friction against his fellows in the every day walks of life, gradually gains wisdom, as the bee gathers honey, and strength, as the athlete gains it, by daily endeavor, until, year after year in our nation's history, we find him coming from the obscurity of his country law office, to lead the bar of a metropolis, to adorn the bench of state and federal courts, and crystalize into enduring law the wisdom he gained in his country practice and life, by the study of those books which God made—the minds, the thoughts, the aspirations, the feelings of his fellow-men with whom he was so long and so closely in touch during his years as a country lawyer. Life may not bring to him as many golden sheaves as to his metropolitan brother, but if the intellectual part of man survives, and we believe it does, he brings to him that which he can take with him when Charon comes to ferry him over, whereas the golden sheaves, so laboriously gathered, might be left behind in eternal quarantine, as infected baggage, while he leaves to the generations that are to follow, the legacy of a jurisdiction enriched by him, for the protection of the life, liberty and property of man.

LAW SCHOOL NOTES.

PROF. E. F. JOHNSON, EDITOR.

— — — — —, ASSISTANT.*

On Wednesday evening, April 12, Judge Cooley delivered a lecture before the students of the law department upon the subject of the treaty powers of the United States government and especially the constitutional questions which have arisen in connection with the recently proposed Hawaiian treaty. He spent some time in reviewing the constitutional questions that were involved in the annexation of Texas and Alaska and then said:

"The consideration of the annexation of Hawaii brings before the country new constitutional questions. The first question that presents itself is whether this country can make a treaty with an independent nation that has only a provisional government. The most important question is as to where the provisional government got its authority to offer Hawaii to the United States. It is evident that there was no effort made to investigate the public opinion of the people as to the question of annexation. Our government is not warranted under the treaty making power to make a treaty with such a government.

"Again, Hawaii comes to us in a different manner than any other country ever has. It would appear that we would have to treat Hawaii as a colony. To hold these islands the United States would be compelled to increase her navy and army. There is no need of this in time of peace." Mr. Cooley said we should not imitate Europe, but change the old maxim and prepare against war in time of peace. The annexation of Hawaii would set a bad precedent. Spain or any other distant nation could in the future be annexed to this country by the same methods by which we propose to annex Hawaii. It could only be done by the legislative power.

Prof. Thompson, at the request and under the auspices of the Student's Christian Association, delivered, during the first semester, a course of lectures on the "Mosaic Law." These lectures were delivered in the law lecture room and were largely attended. The design of the lectures was to call attention, particularly to the common and statute law of the Hebrews from the time of Moses to the beginning of our era. The subject was presented from the lawyer's and not the theologian's standpoint. No attention was paid to the religion or morality of the Jews except so far as was necessary in discovering their national and domestic institutions. The course consisted of eight lectures which were upon the following subjects:

1. Introductory.
2. The Hebrew Tribe, Clan and Family Land Laws.
3. Domestic Relations, Marriages, etc., etc., etc.
4. The Civil and Judicial Duties of the Levites.

* Will be selected before the issue of the June number.

5. Police Regulations.
 6. Criminal Code.
 7. National Festivals.
 8. The National Constitution of the Hedrew Commonwealth and Monarchy.
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Prof. Knowlton is delivering a course of lectures before the Students' Christian Association upon the subject of the "Civil Institutions of the Jews in the Time of Christ." This is a rare course of lectures and will furnish a valuable contribution to legal literature. He has devoted much time and thought to the preparation of these lectures.

The following are the topics which he will discuss:

1. Introduction:
 - (a) Sources of Information.
 1. The Scriptures.
 2. Talmudic Lore.
 3. General Histories.
 - (b) History of the Law.
 - (c) Judea and its Horizon.
 2. The People and the State.
 3. Temple Worship and Life under the Law.
 4. The Schools and the Synagogue. Political Parties.
 5. Criminal Jurisprudence.
 6. The Trial of Christ from a Lawyer's View.
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The annual address before the graduating class and alumni of the law department will be delivered in University Hall on Wednesday, June 28, by Lawrence Maxwell, Solicitor General of the United States. Mr. Maxwell is an alumnus of the University and one of the ablest lawyers of the present day. The commencement annual address before all departments by Charles Dudley Warner follows on Thursday. The University is unusually fortunate in securing men of national reputation for the occasion of commencement week.

There never has been a time in the history of the law department, when the good work done on the part of the students was so general as it has been during the present year. Dean Knowlton has inaugurated a scheme by which he knows, at the end of every week exactly the kind of work each student has done during that week. Under this new regime, the department can care for double the students we now have with just as thorough work on the part of the individual student as it could with its former numbers.

During the past month Dr. William G. Hammond of St. Louis delivered his course of lectures on the subject of the "History of the Common Law" before the resident graduates of the law department. This is a very interesting course. Perhaps no man living to-day is so well prepared to lecture upon this subject as Dr. Hammond. He has made it a matter of special investigation for over twenty-five years.

Among the many incidents of interest which have taken place at the University this month was the first annual debate between this university

and the University of Wisconsin. Great interest was manifested in this debate. It may be that a permanent debating league will be established between these great universities. It was a hard fought battle and a very even one. The markings were very close but a final average made Michigan the winner.

Members of law '91 will be pleased to know that Mr. C. W. Middlecauff, who located at Lanark, Ill., is favorably discussed as a candidate for county judge by the people of his county. Mr. Middlecauff is remembered here as an earnest, hard working student.

Prof. B. M. Thompson of the law department, was honored by the people of Ann Arbor at the recent city election, in selecting him for mayor.

Prof. Champlin, after several weeks' stay in Southern California, returned and resumed his lectures on "Torts" and "Corporations," April 12.

Judge Curtis Buck, law '72, and Belmont Waples, law '91, compose the new law firm of Buck & Waples, at Ironwood, Mich.

Judge Gilman of Ohio, a former U. of M. student visited the senior law class April 6, and delivered a short address.

D. P. Quinlan '94 law has been appointed to fill a vacancy in the legislature from the 32nd district.

M. F. Griffin law '90, who is practicing law at Grand Rapids, visited the law department April 11.

NOTES OF RECENT MICHIGAN DECISIONS.

STIPULATION OF BILLS OF EXCEPTIONS WITHOUT SANCTION OF CIRCUIT JUDGE.—It may be worth the while of several attorneys to observe the following note added to the decision in *Lynch v. Craney* (April 7, Hooker, C. J.): "We notice that the bill of exceptions is stipulated, and does not appear to have the sanction of the circuit judge. We cannot commend this practice, and had the fact been brought to our attention before the argument of the case it would have necessitated the dismissal of the appeal."

A question of considerable importance was presented to the supreme court in *Blackman v. Kent Probate Judge* (April 28, Long, J.), upon the probating of a certain estate the executor, who was also made residuary legatee by the terms of the will, filed a residuary legatee's bond, and the estate was practically taken out of the court for two years or more, when some unexpected claims turned up which exceeded the value of the estate. The residuary legatee then came back into court and petitioned for a hearing upon the claims before the court, as in the usual course of administration. The petition was granted and six months, the statutory time for closing estates against claims, was allowed. The relator, however, petitioned for leave to sue upon the residuary legatee's bond instead. This the probate judge refused, on the ground that the decision of the supreme court in *Lafferty v. People's Savings Bank*, 76 Mich., 35, overturned the long established theory as to the effect of the giving of residuary legatee's bonds, and left the estate still in the court, subject to its orders. Counsel for the relator contended that the decision relied upon is contrary to precedent and justice, and sought, by application and mandamus, to compel the probate judge to allow suit upon the bond, to secure a reversal of the decision and an adherence to the old theory. But the court decided to stand by the decision last made and Michigan will continue to occupy a rather unique position upon this interesting question of probate law.

MUTUAL WILLS—WHEN DIVORCE REVOKES WILL.—The decision in *Lansing v. Haynes, et al.* (March 10, Grant, J.), is without an exact precedent, so far as we can ascertain, and may therefore be considered one of the leading cases upon the subject of revocation of wills. The facts as given in the decision are these: The proponent and Garret Y. Lansing were married in December, 1864. They lived together as husband and wife until 1889 when she filed a bill of divorce against him, and an absolute decree of divorce was rendered in her favor, in 1889. He died in 1891 leaving no children. In 1881 they executed mutual wills, which were identical in language, he devising all his property to her, and she devising all her property to him. By agreement between them she took possession of both wills and preserved them until the decree of divorce was rendered, after which she destroyed her own and deposited his will with her brother, unknown to Mr. Lansing. During the pendency of the

divorce suit they made a division of his property, and entered into an agreement in which it was stated that the deeds executed by them were intended as a property settlement between them. Thereafter they became as strangers. After his death she presented his will for probate. The probate court probated the will, and on appeal to the circuit court this action was sustained. The contestants claimed: (1) That the mutual wills formed a contract, and that the proponent, having revoked her own will, was thereby estopped from claiming under his will; (2) that the deeds and agreement constituted an express revocation of the will; (3) That the will was revoked by implication of law on account of the changed relations of the parties. The court sustained the last objection, and held that the divorce and property settlement constituted such a change in the relations of the parties as to work a revocation by implication. In conclusion the learned judge says: By the decree of divorce in this case the parties became as strangers to each other, and neither owed the other any obligation or duty thereafter. There was therefore a complete change of their relations within the language above quoted from Chancellor Kent. It is not, in my judgment, the natural presumption that, after the testator had settled with her, had conveyed to her a good share of his property, and they by agreement had estimated all their property, as well as their marital relations, that the will executed nearly ten years before should remain in force, and operate upon his death as a conveyance of the remainder of his property to her to the exclusion of his heirs. . . . I do not think the common law is so unbending as to lead to this result. 'The reason of the law is the essence and soul of the law.' Divorces in England were unfrequent, and this may well be held to account for the fact that this question has not arisen there for adjudication in the courts. The natural presumption arising from these changed relations is the reasonable one, and the one which in law implies a revocation. The question is not to be controlled by a possible presumption, but by the reasonable presumption. The possibility therefore that the deceased might have desired that the remainder of his property should go to his divorced wife cannot be considered in determining the question of an implied revocation in this case. Such a disposition of his property would be unusual, and contrary to common experience. It follows that the judgment must be reversed, and judgment entered in this court for the contestants."

FROM THE FATHER OF THE CODE.

In answer to inquiries addressed to him, David Dudley Field, who has done more for law reform and the science of jurisprudence in the United States than any other person, penned the following letter:

22 GRAMERCY PARK, NEW YORK, April 10, 1893.

To the Editors of the "Michigan Law Journal": Your letter of the 20th of March has been lying before me unanswered, because I have been too ill to answer it. I am mending in health, I believe, but still too weak to engage in correspondence of much length and too weak to write an article.

But if I could write it, of what use would it be? I could not write any thing better than I have already written and published. If you will republish and circulate among the lawyers of your state the following, you will have done all that appears to be needful.

First. Republish in every newspaper of Michigan the extract from the speech of Chief Justice Coleridge, which I have copied in my paper published in the *American Law Review* for August, 1891, and which extract is as follows. The speech was delivered as you know before the New York State Bar Association in 1883:

"You have lately procured, may I say most wisely, a great national park, into which the bounties and glories of nature, and strange and eccentric forms which natural objects sometimes assume, may be preserved forever for the instruction and delight of the citizens of this great republic. Could it not be arranged that, with the sanction of the state, some corner in that one park, should be preserved as a kind of pleading park, in which the glories of the *negative pregnant*, *absque hoc*, *replication de injuria*, *rebutter* and *sur-rebutter*, and all the other weird and fanciful creations of the pleader's brain, might be preserved for future ages, to gratify the respectful curiosity of your descendants, and that our good old English judges, if ever they revisit the glimpses of the moon, might have some place where their weary souls might have rest, some place where they might still find the form preferred to the substance, the statement to the thing stated."

Second. Republish in the cheapest form the reprint of the article, taken from the *American Law Review*, that I long ago sent you, and get it into the hands of every Michigan lawyer. The expense will be trifling, and surely there are lawyers enough in earnest on the subject who will defray this expense.

Third. Do the same by Judge Story's famous report on the codification of the common law of Massachusetts, published in 1825 and of which I sent you a copy.

Fourth. Republish and distribute the admirable address of Mr. Justice Brown of the supreme court of the United States.

There will be no use in multiplying documents. These four papers, if put into the hands of every lawyer in Michigan will furnish all the argument necessary. You mention Mr. Alfred Russell as the head of your

Bar, and as opposed to a code of procedure. I am used to arguments pronounced *ex cathedra*. They go little way with me. I remember that Mr. Cave Johnson in congress moved an amendment to the grant in aid of Morse's telegraph, providing for an investigation of animal magnetism. I remember that a learned English professor proved in the *Edinburgh Review*, scarce a month before a steamer crossed the Atlantic, that such a feat was an impossibility. I remember that a West-Point professor, who within a week or two of a telegraph across the Atlantic, showed conclusively to an admiring audience, that the telegraph was a myth, and the promoters of it under an insane delusion.

I remember that, when the New York code of civil procedure was first published, that really great novelist, Mr. Fenimore Cooper, made it the butt of one of his romances, the "Ways of the Hour." I remember, that another great New Yorker, a judge of our supreme court, waved argument away, by saying that the code would be all gone within twenty years. I remember, that when this code first appeared, a brilliant banquet of the New York City Bar resounded with the toast, "Jack Cade and Jack Code," as fit companion pieces in the gallery of things to be shunned and scorned.

The leaders of the Michigan Bar will assuredly pause before setting themselves against the Bars of twenty-six American states, the Bars of England and Ireland, and the Bars of English colonies the world over.

This is all the contribution I can give to the discussions of your Bar Association, and you are quite at liberty to publish it, if you think it will do any good.

Very truly yours,

DAVID DUDLEY FIELD.

MONTHLY RECORD OF SUPREME COURT DECISIONS.*

ADVERSE POSSESSION—Ejectment—Tax title—Claim for improvements. *Paldi v. Paldi*. Long, J. Error to St. Clair. Affirmed.

ASSIGNMENT—For benefit of creditors—Effect of failure to record land contract, mortgage and assignment—Fraud and collusion. *Haug v. Third National Bank et al.* McGrath, J. Appeal from Wayne. Affirmed.

ATTACHMENT—Sufficiency of reasons for issuing the writ—Evidence necessary to support allegation in affidavit for writ—Chattel mortgage to defeat creditors. *Armstrong v. Cook*. Certiorari to Sanilac. Grant, J. Reversed.

BASTARDY—Nature of procedure in prosecutions for—When pendency of one proceeding not bar to another. *People v. Hamilton*. Hooker, C. J. Certiorari to justice of peace. Affirmed.

BILLS AND NOTES—Laches of endorsee in presentment—Proof necessary to charge drawer with promise to pay after discharged by laches of holder. *Hamilton v. Winona Salt & Lumber Co.* McGrath, J. Error to Iosco. Affirmed.

COMMISSIONER'S REPORT—Its confirmation not necessarily final—Accounting. *Petrie v. Torrent*. Hooker, C. J. Appeal from Muskegon. Appeal dismissed.

CONTEMPT OF COURT—Punishment for—Alternative sentences. *In re Sloman*. Grant, J. Certiorari to Wayne. Orders vacated.

CONTRACTS—Breach of—*Quantum Meruit* for work and labor performed—Proof of execution of contract under circuit court rule No. 79—Error in cross-examination by defendant's counsel of person who should be defendant's witness cured by defendant making witness his own. *Hemminger v. Western Assurance Co.* McGrath, J. Error to St. Clair. Affirmed.

DECLARATION—Sufficiency of, in justice's court—Action upon covenant of warranty—When record of tax constitutes lien—Stipulated bill of exceptions without sanction of lower court. *Lynch v. Craney*. Hooker, C. J. Error to Bay. Affirmed.

DEED—Setting aside of, on ground of mental incapacity—Evidence to prove—Burden of proof—Wife not required to join in deed of homestead by husband to herself. *Lynch v. Doran*. Grant J. Affirmed.

EVIDENCE—Admissibility of question on cross-examination which witness had been asked upon direct examination—Rejection, by the court upon its own motion, of incompetent and immaterial evidence. *Beers v. Payment*. Grant, J. Error to Wayne. Reversed.

NAVIGABLE STREAM—What not deemed to be—When special damage must be shown in action for obstruction of—When proper remedy is application to abate as a public nuisance. *Potter v. I. & L. M. R'y Co.* Grant, J. Reversed.

NEGLIGENCE—When setting of fires and allowing to communicate deemed to be—When question for jury to determine—Admissibility of

* Copies of the opinions of the supreme court may be obtained, upon application, from Charles C. Hopkins, clerk of the supreme court, Lansing, Mich.

evidence as to condition of the weather—Damages, testimony admissible to prove—Sufficiency of declaration. *Needham v. King*. McGrath, J. Affirmed.

NEGLIGENCE—Defective sidewalk—Injuries resulting from defect—Admissibility of certain testimony to show notice of alleged defect to the city. *Lappread v. Detroit*. Grant, J. Error to Wayne. Reversed.

NEGLIGENCE—Servant working without the scope of his employment—Defective machinery, notice of. *Wheeler v. Berry*. Grant, J., (McGrath and Montgomery dissenting.) Error to Wayne. Affirmed.

NEGLIGENCE—Notice of defects in bridge—Latent defects—Duty of highway commissioner to inspect bridges. *Blank v. Township of Livonia*. Long, J. Error to Wayne. Affirmed.

PARTNERSHIP—How proven—Intent of parties, test of partnership—Competency of evidence as to conversations before and after written agreement to prove real party in interest. *Webb v. Johnson*. Grant, J. Affirmed.

PLANK ROAD COMPANIES—Constitutionality of act allowing gravel road companies to continue under franchise of plank road companies—How corporate existence proven—Right to amend oral declaration in justice court on appeal—Right to set up failure of company to comply with charter as defense to action for forcibly passing toll-gate—Right of company to sue in assumpsit for penalty. *Canal Street Gravel Road Co. v. Paas*. Long, J. Error to Kent. Affirmed.

PLEADING—Bill in chancery amended by introduction of matter constituting a new bill or inconsistent with the original bill. *Ogden v. Moore*. McGrath, J. Appeal from Osceola. Reversed and bill dismissed.

PROBATE COURT—When citations and formal orders may be issued from, although probate judge disqualified for rendering decision involving exercise of judicial discretion—Duty of circuit courts on appeal—Mental incompetency—When "incompetent" and "incapable" synonymous. *In re Fred H. Leonard*. McGrath, J. Error to Kent. Affirmed.

PROMISSORY NOTE.—Admissibility of note, claimed to have been forged, as evidence—Questions for jury—Cross-examination, latitude allowed in—Doctrine of estoppel *in pais*—What necessary to constitute estoppel. *Pearson v. Hardin*. Hooker, C. J. Error to Saginaw. Reversed and new trial.

PROMISSORY NOTE—Effect of addition of word "agent" to signature—Admissibility of parol extrinsic evidence to show intent as between original parties—Proof under general issue. *Keidan v. Winegar*. McGrath J. Reversed.

RESIDUARY LEGATEE—How far filing of residuary legatee's bond changes usual process of administration. *Blackmore v. Kent Probate Judge*. Mandamus denied.

SALE—Agency, existence of, question for jury. *Hathaway et al. v. Judie*. Long, J. Error to Cass. Reversed.

TAX SALES—Appeals from decisions in tax cases, within what time must be made—How far ordinary chancery practice followed—Construction of Act No. 200, Pub. Acts 1891. *Carney v. Baldwin*. Long, J. Motion to dismiss appeal granted.

TAXATION—Legality of assessment to raise tax to build sewer, where provision of city charter as to submission of estimates to board of public works were not observed, and no notice of the intended improvement

given to property owners, as provided by ordinance. *Mills v. City of Detroit*. Long, J. Appeal from Wayne. Affirmed.

TRESPASS—Street improvements—When adjoining owner estopped from setting up damages by. *Collins v. City of Grand Rapids*. Long, J. Error to Kent. Reversed.

VARIANCE, between declaration and proof, when fatal, in actions for injuries to right of way. *Bolton v. M. & G R. R. R. Co.* Hooker, C. J. Error to Manistee. Reversed.

WILLS—Mutual wills—Revocation by implication—When divorce works a revocation of will. *Lansing v. Haynes*. Grant, J. Error to Ingham. Reversed.

ANNUAL MEETING OF THE MICHIGAN STATE BAR ASSOCIATION.

The third annual meeting of the Michigan State Bar Association will be held in Lansing on Tuesday, June 6, 1893. A circular will be sent to each member of the association stating the time and place of the meeting. The membership of the association has nearly doubled since the last annual meeting. A large attendance is anticipated, for it is becoming apparent that the lawyers of the state are beginning to appreciate the advantages which attach to membership in the association. It is being gradually recognized that the association is becoming a powerful instrumentality in the promotion of law reform as well as a valuable agency for the cultivation of the "brotherhood" of the law.

The papers which will be read at the annual meeting are:

President's Address, Hon. Edward Cahill, Lansing.

The Annual Address, Hon. George H. Durand, Flint.

Revision of the Constitution, Hon. Thomas E. Barkworth, Jackson.

Should Michigan Adopt a Code of Civil Procedure (Affirmative)? Eli R. Sutton, Detroit.

Should Michigan Adopt a Code of Civil Procedure (Negative)? Hon. Alfred Russell, Detroit.

California System of Codes, W. H. H. Russell, Esq., Detroit.

Professional Ethics, Hon. John A. Edget, Saginaw.

The Mission of the State Bar Association, Ralph Stone, Esq., Grand Rapids.

The members of the association owe it as a duty to their profession to attend the annual meeting and contribute to the solution of the questions before it, involving, as they do, the equitable administration of the law.

Grand Rapids, Mich.

RALPH STONE, Secretary.

BOOK REVIEWS.

SMITH ON PERSONAL PROPERTY.—A Treatise on the Law of Personal Property. By Horace E. Smith, LL. D., late Dean of the Albany Law School. Chicago: T. H. Flood & Co.

There has been a real need of a practical text on the subject of personal property. The majority of text-books are written by professors in law schools, and are too elaborate to be practical, and too theoretical and speculative to be of real every day service. Their habits of study lead them into the history of the law, rather than after legal principles. Principles of law, stripped of comment, are what the busy lawyer must have. While Prof. Smith's book is sufficiently didactic for all the purposes of a student, for the practitioner, or intelligent business man, who desires a business knowledge of law, it is the best work on the subject that has come into our hands. Those who wish an analytical treatment of all the classes of personal property in logical order, and which is at the same time concise, exhaustive and practical, will do well to examine this work by Prof. Smith.

CODE PRACTICE IN PERSONAL ACTIONS.—An Elementary Treatise upon the Practice in a Civil Action, as Governed by the Provisions of the New York Code of Civil Procedure. By James L. Bishop. New York: Baker, Voorhis & Co.

After Justinian had digested the laws and imperial constitutions of Rome, he saw at once the necessity of an elementary, or a preparatory treatise, on the same subject. What the institutes of Justinian are to the Roman civil code, Mr. Bishop's work is to the more exhaustive works on code practice. This is pre-eminently a student's book. It should be in the hands of every Michigan lawyer, for sooner or later he will have to commence and learn the system of code pleading. Mr. Bishop states very clearly the history of law reform. We learn that the struggle to break through the limitations of the old common law forms of procedure, commenced almost simultaneously in England and the United States. That in this country the agitation resulted in a complete reformation in New York, as early as 1848, a quarter of a century in advance of England. Since that time twenty-six states have wiped out of existence the mass of technical and burdensome hindrances to the administration of justice, and substituted therefor a logical and systematic body of rules governing procedure. Like a great majority of our best legal works, this book is a compilation of lectures delivered to law students. How one can read an introductory work of this kind, and not be convinced as to the merits of the system as a whole, is a problem. It would seem a problem, because Mr. Bishop fully presents the elementary principles of code practice, in a manner easily understood, and an appreciation of the principles is all that the advocates of law reform desire. Their case can stand on its merits.

After an introductory review of procedure previous to the code, the following subjects are discussed in order: Courts, time of enforcing a civil remedy, commencement of action, parties, pleadings, arrest pending the

action, injunction, attachment, replevin, etc., evidence, trials, judgments, appeals, executions, costs, closing with a chapter on the superior city courts and the city courts of New York. We know of a great many valuable works on code pleading, but we know of no other competent introductory work, which outlines, step by step, an ordinary civil action under the code. It is needless to say that any work published by Baker, Voorhis & Co. is gotten up in the best style.

DEATH BY WRONGFUL ACT.—A Treatise on the Law Peculiar to Actions for Injuries Resulting in Death, Including the Text of the Statutes and an Analytical Table of their Provisions. By Francis B. Tiffany. St. Paul: West Pub. Co.

It has always seemed an anomaly of the law, that while an injured person has a right of action against one whose negligence caused the injury, yet if death ensue, no action lies. The earliest case to enunciate this doctrine was *Higgins v. Butcher*, Yelverton, 89, decided in 1606. The question was not raised again in England until 1808, in *Baker v. Bolton*, 1 Campb. 493, wherein Lord Ellenborough, without citing any authority, or stating any reason, laid down his famous proposition that, "In a civil court, the death of a human being could not be complained of as an injury," which has been accepted as final in nearly all subsequent cases. In 1846 parliament passed Lord Campbell's act, entitled: "An act for compensating the families of persons killed by accidents," which has served as a model for statutes since enacted by almost all the states of the Union.

These facts are taken from Chapter 1, of Mr. Tiffany's treatise. The law is stated clearly and logically. This is eminently a work for practitioners, and is as valuable in Michigan as Minnesota. In the somewhat elaborate appendix, are collected the statutes giving the right of action for injuries resulting in death, in force in England, United States, and Canada. Michigan statutes are found in How. Stat., Secs. 8313-14; 3391-92; 3491-92, and 8713. A unique feature of this work is the analytical table, giving in comparative form the leading provisions of the statutes now in force on this subject. Great care has evidently been taken in preparing this table, and it would seem that such a scheme would vastly facilitate investigation of cases that arise. Mr. Tiffany has been peculiarly happy in his treatment of this hitherto poorly treated subject.

BOISOT ON BY-LAWS.—The Law of By-Laws of Private Corporations. By Louis Boisot, Jr., of the Chicago Bar. Chicago: The United States Corporation Bureau.

This work is scarcely more than a thesis but it covers the subject completely. Its brevity and condensation are, in fact, its chief virtues. The law of by-laws necessarily cannot be treated in more than a few pages, for it must be remembered that the law of corporations, which gives rise to it, is a branch of the law which has come into being and reached its greatest development almost within the recollection of the present generation. The subject of Mr. Boisot's little treatise is one which is becoming of more importance, because the forms of greatest business activity are finding expression more and more in corporations large and small. Industrial life is centering in corporations, and the individual merchant and manufacturer is either being absorbed by organized, soulless, business agencies or is forced out of the industrial

world by cruel, relentless competition. These may be trite observations, but they are advanced to point our remarks upon the importance of Mr. Boiset's book.

The law pertaining to by-laws has never been made the subject of any book. The author has confined himself to the subject of by-laws of private corporations, leaving out of view on the one hand the ordinances of municipal corporations and on the other the rules of unincorporated associations. Attorneys for corporations will find that this volume will provide them considerable information which they would, in the absence of any other text-book on the subject, have to obtain by laborious original research. The work treats of the nature of by-laws, their form and enactment, subject-matter, construction, effect, enforcement, necessity and proof. A vast number of cases for so limited a branch of the law, are cited. There are many text-books which re-hash ancient law which we cannot endorse, but this is a treatment of comparatively a new phase of the law which we can freely commend to corporation lawyers.

BLACK ON TAX TITLES.—A Treatise on the Law of Tax Titles, their Creation, Incidents, Evidence, and Legal Criteria. By Henry Campbell Black, M. A., of the Washington Bar. St. Paul: West Publishing Co.

This is the second edition of Mr. Black's work. The fact that a second edition has been published is evidence enough that the book has met a ready sale, and is appreciated by the practicing lawyer. It is not a treatise for students because it covers only a branch—a considerable branch however—of real property law.

Tax titles were originally looked upon as of little validity, but the holders of land by such titles finally became so numerous that the courts and legislatures of the states were forced to recognize their rights. The preponderance of tax title law is statutory, and in one sense each state has formulated its own law on this subject. But there is a vast amount of unwritten law and Mr. Black's work covers it completely, paying proper attention, however, to the statutes which have features of similarity in all the states. It is a work that should be studied in conjunction with the statutes of the lawyer's own state. It has the virtue of being terse.

The first five chapters of the book treat of the general subject of assessment and taxation, being a sort of introduction to the treatise on tax titles. These chapters are of practical value outside of the subject of the work. They discuss: Taxation in general and its constitutional limitations, exemption of property from taxation, apportionment of taxes, assessment of taxes, and the equalization and review of assessments. The chapter on exemption of property from taxation is of especial interest in Michigan at the present time. A bill is now before the legislature which withdraws certain lands, notably church lands, from the benefit of exemption from taxation. Mr. Black treats the general subject of exemption under two heads: (1) Exemption of public property; (2) Exemption by legislative grant. Under the latter he treats, among other subjects, the powers of the legislature to exempt, what is necessary to make that exemption valid, and then takes up certain kinds of lands, viz; belonging to manufacturing corporations, religious societies, cemeteries, charitable institutions and educational institutions.

There are two thousand cases cited in the work and these references are the very latest. The index is prepared, to meet the demand for a modern and exhaustive index. The table of contents is also excellent.

The mechanical work is of the best and the fact that the West Publishing Co. place the work on the market is sufficient evidence that it is standard.

CHEEVER'S LAW AND PRACTICE OF PROBATE COURTS FOR MICHIGAN.—By Noah W. Cheever, Attorney at Law, and formerly Judge of Probate for Washtenaw County. Ann Arbor: The Register Publishing Company (The Inland Press).

This work, as appears by the title page, is "the third edition of Cheever's Probate Practice, comprising the law and practice in probate courts in the state of Michigan; containing the entire probate statutes, including the laws of 1891, reprinted and rearranged, with notes under each section, showing the practice and decisions of the courts in connection with the same." As there is no other work upon Michigan probate practice this work has found an open field and is of considerable value to the profession. Judge Cheever has the experience and ability to prepare an excellent treatise upon this subject. A careful examination of the work will convince one that he has devoted a great deal of time and attention to the work and has collected the law upon the subject with thoroughness. The value of his labors to the profession, however, has been very seriously impaired by imperfections in the mechanical arrangement and editing of the work. These, we think, are so apparent that in justice to the commendable features of the work the defective ones should be referred to. In the first place, there is no table of contents of any kind. Again, the index, though arranged alphabetically by the general headings, yet in the sub-headings no attempt has been made to continue the alphabetical arrangement. Inasmuch as the index is the key to the law locked within the pages of a book the seriousness of this error cannot be over-estimated. The cases cited are given in ordinary type, each occupying a whole line, following the proposition in the text to which it refers. The sections of the statutes referred to are also given in the midst of the text. These references should be given as foot-notes. Certain parts of the text which are either explanatory or given parenthetically might also be put as foot-notes. If the paragraph headings were in bold-faced type instead of smaller type it would also give the page a better appearance. These criticisms are not given because of a desire to find petty faults, but to impress upon those who may condemn the work, upon first examination, that the chief fault is the unfortunate manner of arrangement and not the lack of conscientious work by the author. The appendix of forms is very complete, and is a valuable feature of the work.

BOOTH ON STREET RAILWAYS.—By Henry J. Booth, of the Columbus Bar. Philadelphia: T. and J. W. Johnson & Co.

This is a treatise on the law of street railways embracing surface, sub-surface and elevated roads, whether operated by animal power, electricity, cable or steam motor, and to the best of our knowledge is the only work exclusively on street railways published. Keasbey on Electric Wires in the Highways treats of the electric railway among other subjects, and Thompson on the Law of Electricity discusses electric railways incidentally. Other works deal with street railways operated by other agencies, but there has been published as yet no work devoted entirely to street railways of all kinds. Street transportation has been developed to such a high state of perfection, the interests involved have become of such mag-

nitude, and litigations over the rights of the railways and the public has increased to such a volume that a collection of the law for the use of attorneys has become almost imperative. New questions have arisen by reason of the change of public sentiment towards the encroachment of railroad corporations upon private property rights, and the courts have made many departures from established legal principles. The study of the law of street railways opens an intensely interesting field for research, and the problems which are encountered offer opportunities for investigation which are attractive to active legal minds.

Mr. Booth has produced a book which is deserving of the honest praise of the reviewer. He gives evidence that he has collected and prepared the subject-matter with care and discrimination, and with a thorough interest in the work. The present efforts of the electrical trust to gain control over all the electric railways of the country lend additional interest to Mr. Booth's treatise, not because the success of the trust is liable to lead to any radical changes or modifications in the law, but because public interest is being centered in the great corporations which control street railways and their actions are noted with jealous watchfulness by that public from which the railway corporations must expect grants of privileges. An absorption of the management of the electric railways of the country into the hands of a single corporation will undoubtedly induce a reaction against corporate control of railways generally.

Mr. Booth's work is upon a subject which for the above reasons is susceptible to modifications. He has presented the law as it is, however, in admirable shape. He has evidenced originality of statement, and no one who has given the subject any study can complain of the completeness with which he has covered the latest cases. He traces the law of the right to construct and operate street railways and its sources and extent; the rights of the public and the liabilities of the railways; the right of owners of abutting property, a very important branch of the law; with a chapter devoted entirely to electric street railways—which is necessarily, from the condition of the law, very brief; a treatment of the law of elevated railroads; the regulation of street railways by statute and ordinance; pavement and restoration of streets; taxation and assessment; negligence of railways and passengers; and the relations between the company and its servants.

The work embraces 748 pages and the index is all that the modern index should be,—complete and easily handled.

VANFLEET'S COLLATERAL ATTACK ON JUDICIAL PROCEEDINGS.—By John M. Vanfleet, Judge of the Thirty-fourth Judicial district of Indiana. Chicago: Callaghan and Company.

Some men write law books as a business; but the works of these "professional law writers," as they may be called, are usually looked upon with disfavor. Some of them, however, are meritorious productions, and occupy a high position in the esteem of the profession. Too often, though, they are but digests, with little or no originality even of style or arrangement. A work therefore which bears upon its face the imprint of patient and persistent study, and pains-taking work in its preparation, is always welcomed by the profession. It is just such a work that Judge Vanfleet has produced. It is the culmination of many years of earnest study and the exhaustive research of a mind of more than ordinary legal acumen. Taking into consideration the ability of the author and the great scope of

his subject the unusual practical value of this book will be readily seen. The lack of just such a work has long been noticed. That it "fills a long felt want" is a hackneyed expression, but the truth cannot be stated in fewer words. Many a time has it been a perplexing question whether a judgment, sentence or decree, the validity of which has been questioned, is merely voidable, and effective until set aside by a direct proceeding, or whether it is void, so that it may be set aside in a collateral proceeding. Until now the answer to this puzzling question must have been sought in numberless volumes of conflicting decisions. Seven years ago the learned author, while investigating the subject of judgments, found that one-fifth of the cases studied experimentally upon that subject involved the subject of collateral attack. Since that time he has devoted all his spare hours to the work of collecting the law upon this neglected branch of the subject with unflagging zeal. From a great mass of conflicting decisions, and the chief text-books upon a variety of subjects, he has created a systematically arranged treatise, which contains more evidences of hard and careful work than any single volume which has been placed in our hands for review. He begins with a discussion of the principles involved, and analogies and comparisons between direct and collateral attack, and *res judicata*. He next discusses the tribunal, and the constitutional, statutory and common law infirmities in its organization. He then takes up the subject of jurisdiction, and under classified headings very much like the arrangement of an encyclopædia, treats the many intricate questions, as to the taking and exercise of jurisdiction, and how it may be lost. These chapters are followed by an interesting one upon the effect of statutes declaring the effect of judicial proceedings. The concluding chapters are upon judicial actions, presumptions, foreign judgments, liability of judicial officers, pleading, practice and evidence, and estoppel against contesting void proceedings. One of the characteristics of the work is the fearless criticisms of the author upon many of the decisions referred to. His manifest fund of information upon the subject makes this not only tolerable, but welcome. Inasmuch as the courts of last resort in the several states frequently, as is pointed out in several cases, hold views squarely opposing upon many of the questions involved, it is a relief to know where to go for counsel. The subject is so intricate and voluminous that subsequent editions will of necessity be greatly enlarged; but the publishers of this first edition have shown good sense in condensing into one large volume what might, with a little "padding" too often resorted to, have been made to occupy two volumes. This the profession will surely appreciate. The typographical appearance is excellent, and the mechanical arrangement, table of contents, index, etc., are all in keeping with the other admirable features of the work.

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THE LAW OF BILLS AND NOTES UNDER MICHIGAN DECISIONS.*

F. W. STEVENS.

IV. PRESENTMENT, PROTEST AND NOTICE.

Presentment. In order to fix the liability of an endorser of a note or the drawer or endorser of a check, draft, or bill of exchange, the paper must, at maturity, be presented to the maker or acceptor for payment or to the drawee for acceptance, as the case may be, and if payment or acceptance be neglected or refused, a notice must immediately be given to the drawer or endorser, describing the paper, showing its dishonor and notifying the party to whom it is addressed that he is looked to for payment, unless after reasonable diligence he cannot be found.¹ But it has been determined that the maker is liable to an endorser who has paid the note, whether there was legal protest or not, the court holding that the maker is not prejudiced by want of protest and cannot raise the question when called upon to indemnify the endorser.²

The time and mode of presentment and the proceedings upon non-payment or non-acceptance are governed by the law of place where the instrument is made payable, but the law of the place of endorsement governs the notice of dishonor.³ If no place of payment is specified in the note, it is presumed to be payable at the residence of the maker; and this presumption applies to and is for the benefit of the endorser.⁴ As against the maker no presentment is necessary, even though the note specifies a particular

* Continued from the May number.

¹ Sweet v. Woodin, 73-393.

² Treadway v. Antisdell, 86-89.

³ Snow v. Perkins, 2-238. Bissel v. Lewis, 4-450.

⁴ McIntyre v. Mich. State Ins. Co., 52-188

place of payment.⁵ But where one receives negotiable paper from his debtor, with the debtor's endorsement, as collateral security for his demand, and not as agent merely, it is his duty to present the same to the maker for payment, when due, and to take the usual steps to charge his debtor as endorser. Otherwise, he makes the paper his own and the owner is released.⁶ But this rule does not apply to a non-negotiable order drawn on a debtor and taken by a creditor of the maker merely as conditional payment.⁷

Presentment, when necessary at all, must be made upon the last day of grace allowed by statute.⁸ Grace is not allowed on demand paper and presentment must be made without unreasonable delay. A draft or bill payable at sight must also be presented within a reasonable time,⁹ and in the case of *Phoenix v. Allen*, before cited, the court said that no delay is reasonable beyond that which is required in the ordinary course of business without special inconvenience to the holder. Under the circumstances of that particular case 21 days was held unreasonable. The rule as to bank drafts issued for negotiable purposes is more liberal. They are not required to be forwarded at once for acceptance and payment and an endorser will not be discharged by delay for a reasonable time, although longer than might be held reasonable in regard to private drafts not meant to circulate.¹⁰ In this connection it may be well to state that it has been determined that there is no privity of contract between the payee and the drawee of a draft; that the draft does not operate as an assignment of funds of the drawer in the drawee's hands, and that the funds cannot be reached by proceedings at law or in equity.¹¹

Acceptance of bills of exchange are required by statute to be in writing, and the statute has been sustained.¹² If the person making the presentment for acceptance agree to present it again, no protest can be made without a new presentment.¹³ If the

⁵ *Reeve v. Pack*, 6-240.

⁶ *Jennison v. Parker*, 7-355. *Phoenix Ins. Co. v. Allen*, 11-501. *Whitter v. Wright*, 34-92.

⁷ *Briggs v. Parsons*, 39-400.

⁸ *Howell*, Sec. 1581-2.

⁹ *Phoenix v. Gray*, 13-191.

¹⁰ *Nutting v. Burked*, 48-241.

¹¹ *Grammel v. Carmer*, 55-201. But see *Moore v. Davis*, 57-251.

¹² *Howell*, Sec. 1583. *Ellitt v. Miller*, 8-132.

¹³ *Case v. Burt*, 15-82.

drawee does not refuse acceptance but desires time to examine his accounts before deciding, it was held in the case last cited that he is entitled to twenty-four hours for that purpose. Bills payable on demand or at a certain time, may be presented for *acceptance*, but if no presentment is made until maturity, the duty to present for acceptance is merged in the duty to present for payment.

A post-dated draft, purporting to be payable at sight, is, for all legal purposes of presentment, protest and payment, a draft payable so long after date. It differs from a time bill in that a time bill may be sent forward meanwhile for acceptance, while a post-dated bill cannot, and the drawee cannot retain funds to meet it before its date, as against other bills.¹⁴

Where a bill is drawn by the officers of a corporation upon its treasurer, no presentment for acceptance is necessary, the act of drawing being deemed an acceptance.¹⁵ But a lumberman's order in this form: (date and address). "Pay to the order of B. T. the sum of ten dollars and charge the same to Company." (Signature) is essentially a draft and must be accepted before it will sustain an action.¹⁶ And where a bill was directed to "John A. Wells, Cashier Farmers and Mechanics Bank of Michigan," and was accepted by writing "Accepted, John A. Wells, Cashier," it was held drawn upon and accepted by the bank, and not by Wells in his individual capacity.¹⁷ Where a drawer had never supplied his drawee with funds to meet a draft accepted by the drawee for accommodation, the drawer was held not released by the holder's failure to present the draft promptly.¹⁸ An acceptor whose liability has not been changed by subsequent dealings can be sued on his acceptance,¹⁹ and an acceptor having paid a bill cannot recover its amount from the payee on the ground of a mistake of fact as to the nature of his security from the drawer.²⁰

Protest. The early case of *Platt v. Drake*,²¹ defined a protest to be a formal instrument made by a notary, alleging the due presentment and dishonor of a bill and declaring that the notary protests the same for non-payment or non-acceptance, as the case

¹⁴ *N. Y. Iron Mine v. Citizens Bank*, 44-544.

¹⁵ *Haasey v. White P. Co.*, 1 Doug., 198.

¹⁶ *Finan v. Babcock*, 58-801.

¹⁷ *F. & M. Bk. v. Troy Bk.*, 1 Doug., 457.

¹⁸ *Crompton v. Blair*, 46-1.

¹⁹ *Canadian Bk. v. Combs*, 47-358.

²⁰ *First Natl. Bk. v. Burkham*, 32-238.

²¹ 1 Doug., 296.

may be, and held that a statement that a bill or note has been "protested" refers to the making of this instrument rather than to the acts which authorize it; so that notice to the endorser of a promissory note that the note "has been protested for non-payment" and that the holders look to him for payment, was not a sufficient notice of dishonor. Because "protests" are *necessary* only in cases of foreign bills of exchange, and the protest of a promissory note is unnecessary and even nugatory, and the notice of dishonor must contain words directly or by necessary construction showing that the note has been presented for payment and payment refused. This case was commented on in several later cases. First, in *Spies v. Newberry*,²² which held that the doctrine did not apply to a notice of dishonor to the endorser of a foreign bill of exchange, because protest of such a bill being necessary the term "protested" implied that payment had been demanded and refused. Again in *Snow v. Perkins*,²³ it was held that where the law of the state where a promissory note is payable authorizes its protest for non-payment, a notice like that given in *Platt v. Drake* is sufficient to charge the endorser. And that case was distinguished in that when it was decided, no notice was taken by the court of the statute authorizing protest of a promissory note by a notary; and it was therefore neither affirmed nor overruled. In *Newberry v. Trowbridge*,²⁴ a similar notice of dishonor was held insufficient, and the case of *Platt v. Drake* was affirmed. A more liberal and what is now the more correct doctrine was laid down by the court in *Burkham v. Trowbridge*,²⁵ holding that no technical phrases are necessary, but it is only required that the terms used in a notice of dishonor be such as fairly and naturally to lead a mind of ordinary intelligence to the idea that the paper has been presented at maturity and been dishonored and that the party notified is looked to for payment, and the case of *Platt v. Drake* followed by *Newberry v. Trowbridge*, was doubted and, it seems, overruled. In *Cromer v. Platt*,²⁶ Justice Campbell refers to and approves the doctrine just stated and it may be said to be the law now governing the requirements of a notice of dishonor. The notice in the case last cited was held good, (Justice Graves

²² 2 Doug., 425.

²³ 2-238.

²⁴ 4-391.

²⁵ 9-209.

²⁶ 37-132.

dissenting) although nothing was said in it of a demand of payment and refusal. In *Snow v. Perkins*, *supra*, a misdescription of the note in the notice was held not fatal, it describing the note as for \$175, when the correct amount was \$200, the endorser not being misled thereby.

A copy of the certificate of protest need not accompany the notice of dishonor,²⁷ nor be included in a declaration.²⁸ The notice of dishonor need not be given by a notary. But there is an advantage in having a notary demand payment and give notice, because his certificate is *prima facie* evidence of the acts done. The holder may give the notice himself and in his own language, but it is no avail whatever unless the paper has legally been dishonored;²⁹ and proof of any one or more of the steps necessary to charge an endorser has no tendency to prove a compliance with the rest.³⁰ The sufficiency of a notice of protest will not, however, be considered, if the fact of receiving notice be not denied on oath by the defendant.³¹ The statute regulates the mailing of notices of dishonor³² and the cases of *Nevius v. Bank of Lansingburg*, *supra*, and *Newberry v. Trowbridge*,³³ decided previous to the statute, are unimportant now so far as they relate to that question. In *National Bank v. Cade*,³⁴ a notice of dishonor was addressed to one postoffice, being the village where the note was payable, when the endorser resided eight miles distant and had for several years received his mail at a postoffice close to his residence; the notice was never received. It was held that the statute regarding mailing notices had not been complied with and that the endorser was released. *Wood v. Callaghan*,³⁵ is an important case on the subject of notice of dishonor, and from it the following principles may be asserted: (1) The owner need give notice of dishonor only to his immediate endorser. (2) On receipt of the notice by such endorser he must with due diligence give like notice to his endorser or the latter will be released. (3) Deposit

²⁷ *Atwater v. Streets*, 1 Doug., 455.

²⁸ *Buhl v. Trowbridge*, 42-44.

²⁹ *Cromer v. Platt*, 87-132.

³⁰ *Cicotte v. Morse*, 8-424. *Nevius v. Bk. of Lansingburg*, 10-547.

³¹ *First Natl. Bank v. Freeman*, 47-408. *Fish v. First Natl. Bk.*, 42-208. *Howell*, Sec. 632.

³² *Howell*, Sec. 1586.

³³ 4-391.

³⁴ 73-449.

³⁵ 61-402.

of the notices in a letter box is equivalent to a deposit in the post-office. (4) The fact that a second endorser did not receive notice of dishonor for five days, although a resident of the place where the note was payable, does not of itself release him, if due diligence is exercised by his endorser, who lives somewhere else, in mailing the notice, and the delay is due to the postoffice department.

The rule requiring notice is one of substance, and a lack of it, in a case where it may be given, is *conclusively* presumed to have injured the endorser,³⁶ and evidence is never admissible to show no injury.³⁷ As to the diligence that must be shown to find an endorser or his correct postoffice address, see *Bank v. Cade*,³⁸ and *Sweet v. Woodin*.³⁹

But every endorser and every holder is presumed to know what action is necessary to hold the endorser.⁴⁰ So, where an endorser, with full knowledge of the facts, recognizes his liability, he will be bound. As, where he states to the holder that he expects to have to pay but requests him to try to collect it of the maker.⁴¹ But an offer of compromise does not operate as a waiver of notice,⁴² nor an equivocal answer to a holder.⁴³

V. BONA FIDE HOLDERS.

In the early judicial history of the state, the familiar doctrine that one who purchases negotiable paper for a valuable consideration before maturity, in the course of business, and without knowledge of any existing equities between the original parties, takes such paper unaffected by any such equities, was settled.⁴⁴ But the decisions upon the subject are numerous; some fine distinctions have been drawn; and it was not until a few years ago that the law governing the subject could be said to be well determined.

One of the first questions for the court to determine was whether one would be a *bona fide* holder who took the paper in

³⁶ *Smith v. Long*, 40-555. *Stewart v. First Natl. Bk.*, 40-348. *Sweet v. Woodin*, 73-393.

³⁷ *Whitten v. Wright*, 34-92.

73-449.

³⁹ 72-393.

⁴⁰ *Cromer v. Platt*, 37-132. *Goot v. Brigham*, 41-227.

⁴¹ *Parsons v. Dickinson*, 23-56.

⁴² *Newberry v. Trowbridge*, 13-264.

⁴³ *Cromer v. Platt*, 37-132.

⁴⁴ *Reeves v. Scally*, Walk. Ch., 248.

payment of an antecedent debt or whether he must have parted with something at the time of taking the paper. In an early chancery case⁴⁵ it was held that he would not be a *bona fide* holder for value so as to cut off equities; but the contrary doctrine was soon after settled by the case of *Bostwick v. Dodge*,⁴⁶ (following the decision of Judge Story in *Swift v. Tyson*,)⁴⁷ and the doctrine is affirmed by later cases.⁴⁸ But the antecedent debt must have been actually extinguished, or the purchaser cannot be said to have taken the note for value.⁴⁹

Until 1885 the effect of taking a note merely as collateral security had not been determined in this state. In that year, in a case in which the question was not disputed, the supreme court accepted the doctrine that such a holder could not be a *bona fide* holder and was subject to all the defences existing against the payee.⁵⁰ But the consideration need not be in money in order to have the note come to the purchaser "in the course of business."⁵¹

When a chattel or real estate mortgage secures *negotiable* paper, a *bona fide* assignee of the mortgage is not affected by existing equities.⁵² But this is not so when the paper is not negotiable.⁵³ For the transferee of paper not negotiable always takes subject to equities.⁵⁴

Although a purchaser of negotiable paper had notice of existing equities, he still takes it free of those equities, it is held, provided the party from whom he purchased was a *bona fide* holder in all respects. And the same is true, even where the instrument is transferred by the *bona fide* holder after the maturity of the note.⁵⁵ This is upon the theory that a *bona fide* holder may transfer all rights possessed by him, and that negotiability does not cease at maturity. This doctrine is subject to

⁴⁵ *Ingerson v. Starkweather*, Walk. Ch., 346.

⁴⁶ 1 Doug., 413.

⁴⁷ 16 Peters, 1.

⁴⁸ *Outhwaite v. Porter*, 1-533. *Hanold v. Kays*, 64-439.

⁴⁹ *Burroughs v. Ploof*, 73-607. *Bank of Dowagiac v. Dill*, 84-549. *Henriques v. Ypsilanti Bank*, 84-168.

⁵⁰ *Kelley v. Freedman*, 56-325.

⁵¹ *Chapman v. Remington*, 80-552.

⁵² *Reeves v. Scally*, Walk. Ch. 248. *Dutton v. Ives*, 5-515. *Helmer v. Krolick*, 36-371.

⁵³ *Russell v. Waite*, Walk. Ch., 81. *Nichols v. Lee*, 10-526.

⁵⁴ *Spinning v. Sullivan*, 48-5. *McKenna v. Kirkwood*, 50-544.

⁵⁵ *Godfrey v. Disbrow*, Walk. Ch., 260. *Shaw v. Clark*, 49-384. *Wood v. Starling*, 48-592. *Carpenter v. Greenop*, 74-665. But see *Simons v. Morris*, 53-155.

the exception, however, that if the *payee* becomes such purchaser he takes subject to all equities.⁵⁶

Every holder is *prima facie* an innocent holder. As a rule this presumption lasts so long as no evidence is introduced to impeach his position as such.⁵⁷ But evidence of fraud or illegality of consideration *in the inception of the note*⁵⁸ or of such knowledge as to have made the holder guilty of *bad faith* in buying the note with the intention of enforcing payment of it⁵⁹ will overcome the presumption and cast upon the holder the burden of proving that he took it in good faith and gave value for it. The same rule applies when the question arises between payee and holder, involving the fraudulent procuring of the note from the payee.⁶⁰ No other form of defence, it seems, save that of fraud or illegality of consideration *in the inception of the note*, can be offered in an action by an endorsee until his position as a *bona fide* holder is attacked by evidence.⁶¹ The free circulation of mercantile paper having legitimate inception is thus encouraged, and a different rule applied to it than is applied to paper which is obtained by fraud. So, it may be said, that paper obtained by fraud will still be enforced in the hands of an innocent holder, but proof of such fraud casts upon the holder the burden of showing his entire good faith. While, if the maker seeks to avoid payment of the note on account of transactions occurring subsequent to the giving of the note, he has the burden not only of showing such transactions, but also that the holder was aware of them or did not purchase the note for value.⁶²

Another line of cases establish an important principle.⁶³ They have been referred to under the head of "Delivery," but their importance justifies further comment. It is held that even a *bona fide* holder cannot recover on a note where the maker's signature to the note has been obtained through the substitution of one paper for another, as he was about to sign, or by misreading

⁵⁶ *Kost v. Bender*, 25-515.

⁵⁷ *Wright v. Erwin*, 33-32.

⁵⁸ *Paton v. Coit*, 5-505. *Goodrich v. McDonald*, 77-486.

⁵⁹ *Miller v. Finley*, 26-249. *Goodrich v. McDonald*, 77-486.

⁶⁰ *Horgan v. Wyman*, 90-121.

⁶¹ *Polhemus v. Ann Arbor Bank*, 27-44. *Conley v. Winsor*, 41-254. *Carrier v. Cameron*, 31-378. *Nichols v. Sober*, 38-681.

⁶² In addition, see *Mace v. Kennedy*, 68-389.

⁶³ *Gibbs v. Linabury*, 22-479. *Anderson v. Walter*, 34-113. *Bank of Sturgis v. Deel*, 55-592.

or other device, so that the signature itself was obtained by fraud and deception, amounting to a forgery, or, otherwise stated, where the maker has unintentionally signed a promissory note supposing it to be something else. There must, it is said, be no negligence on the part of the maker in such cases, or he will be liable; but it would seem that in every such case there is negligence in some degree, and that the maker should suffer rather than an innocent purchaser of the note. The contrary is established, however, in a careful opinion in the leading case of *Gibbs v. Linabury*.⁶⁴ To say the least the doctrine is one that calls for positive proof from the maker, and needs to be very carefully applied. What seems to be a conflicting doctrine was held in *Bank v. Butler*,⁶⁵ namely: That it is no defense against a *bona fide* holder to show that the note was obtained from the maker by *duress*.

It becomes important, therefore, to know what evidence is sufficient to show bad faith on the part of a purchaser of a note, and what is not sufficient.

To prove knowledge on his part that the note was given for a patent right⁶⁶ or that the payee is engaged in selling liquors, when a prohibitory law is in force,⁶⁷ or the fact of an endorsement *without recourse*,⁶⁸ or the mere fact that the payee has an interest in getting the paper off his hands,⁶⁹ will not be held to have put a purchaser upon inquiry or raise such a suspicion of its validity as to preclude his being a *bona fide* holder. In determining the question of *bona fides* it is the purchaser's good faith and not the payee's that is in question.⁷⁰ And it has frequently been held that the purchaser must be shown to have knowledge or notice of facts and circumstances which would make his purchase an act of bad faith, before a defense can be made against the note, except in case of a fraudulent inception of the note, as before stated.⁷¹

On the other hand, if a proposed purchaser knows that the real consideration for the note was a separate written agreement of a so-called Bohemian oat association, which he has seen, and

⁶⁴ 22-479.

⁶⁵ 98-192.

⁶⁶ *Miller v. Finley*, 26-249.

⁶⁷ *Bottomley v. Goldsmith*, 36-27.

⁶⁸ *Borden v. Clark*, 26-410.

⁶⁹ *Helmer v. Krolick*, 38-371

⁷⁰ *Helmer v. Krolick*, 36-371.

⁷¹ *Mace v. Kennedy*, 68-389. *Davis v. Seeley*, 71-209. *Iron Mine v. Bank*, 44-352.

which on its face gives a strong inference of fraud, he cannot claim the rights of a *bona fide* holder, but will be held to have taken the note subject to the fulfillment of the written agreement.⁷³ And in the case of *Ward v. Doane*,⁷³ the supreme court held that it was proper for the trial judge to charge the jury that if the plaintiff knew generally about the Bohemian oat scheme and that farmers were being swindled by it, and that he knew when he purchased the note, or was so informed that it had been given for Bohemian oats, he could not recover. In other words, the fraud was so generally known that no one could be held to be a *bona fide* holder who had notice that the note was given for such a consideration. In the same case, it was held that such a note was so far void as to prevent recovery by an endorsee against the payee and endorser.

In the "Bohemian oat cases" (so-called) especially in the case of *Davis v. Seeley*, 71-209, the supreme court were under strong temptation to depart from the well-settled principles applicable to this subject, the note in the last-mentioned suit having been obtained from the maker through "one of the grossest schemes of fraud ever practiced upon the agricultural community known to the present generation." However, the temptation was not yielded to, the majority of the court, in an able opinion written by Justice Champlin, re-asserting the doctrine of the former cases, and refusing to hold that even such a note was void in the hands of an innocent holder.⁷⁴ And the court further held that the innocent purchaser of such a note may, without waiting to sue the maker, recover the consideration paid for it, from one who sold it representing it to be a good note.⁷⁵ But in *Davis v. Seeley* this assertion was made for the first time: That while negotiable instruments fair on their face will be enforced when in the hands of innocent holders, even if not enforceable between the original parties on the ground of public policy, yet if declared void *by statute*, they will not be enforced in the hands of any person. There seems to be no case, however, to which these principles have since been applied.

When proof of a *bona fide* purchase becomes necessary under

⁷³ *Sutton v. Beckwith*, 68-303. *McNamara v. Gargett*, 68-455. *Mace v. Kennedy* 44-389.

⁷³ 77-328.

⁷⁴ Followed in *Goodrich v. McDonald*, 77-486, and *Hunt v. Rumsey*; 83-136.

⁷⁵ *Evang v. Stuhrberg*, 78-145.

the rules before stated, the proof must be clear.⁷⁶ It is especially strong when it appears that the maker told the proposed purchaser that the note was all right and that he expected to pay it, which would create an estoppel against the maker.⁷⁷ But a finding by a circuit judge that the transferee, at the time of purchasing for value, had no knowledge of the "details of the origin of the note," was held not equivalent to a finding that he was a *bona fide* holder.⁷⁸ There must be a want of notice of defects not only at the time of the purchase, but at the time of the payment of the purchase money. If between those times, the purchaser ascertains that there is a defense, he cannot safely pay the price.⁷⁹ If one is privy to the procurement of an endorsement to a note by false representations as to the responsibility of the maker, he cannot become a *bona fide* holder as against such endorser.⁸⁰ Nor can the holder of a note made to a person who is in fact their agent and given to him as such, and by him transmitted to them claim the rights of innocent holders.⁸¹ And where the cashier of a bank is one of the makers and payees of a note, it is held that the bank cannot be a *bona fide* holder.⁸²

Furthermore, in order to be a *bona fide* holder, the purchaser must have taken the paper by ordinary endorsement. A holder by *assignment* or *sale* from the original payee, or by delivery only, obtains no right superior to the payee and takes subject to equities between the maker and payee.⁸³ For instance, the endorsement of a payee's "right, title and interest" destroys negotiability, and the endorsee cannot be a *bona fide* holder.⁸⁴ In view of *Wood v. Sterling*,⁸⁵ this may not be true in case a *bona fide* holder should so transfer the paper. And in the case of paper payable *on demand*, no one can become a *bona fide* holder who does not take it within "some reasonably short period."⁸⁶

A payee may, in a sense, be a *bona fide* holder, as where he

⁷⁶ *Carrier v. Cameron*, 31-373.

⁷⁷ *Sutton v. Beckwith*, 68 303.

⁷⁸ *Tilden v. Barnard*, 43-376.

⁷⁹ *Warner v. Whittaker*, 6-133. *Watson v. Melchor*, 42-477.

⁸⁰ *Lanheim v. Fay*, 27-70.

⁸¹ *Rickle v. Dow*, 39-91.

⁸² *Tilden v. Barnard*, 43-376.

⁸³ *Spinning v. Sullivan*, 48-5. *Minor v. Bewick*, 55-491. *Sweet v. Swift*, 65-91.

⁸⁴ *Anaba v. Yeomana*, 39-171.

⁸⁵ 48-592.

⁸⁶ *Tripp v. Curtenius*, 36-499.

called to it. In such a case, it has been held, he may recover on the note.⁸⁸

VI. ALTERATION.

The alteration in a material part by the holder of a negotiable paper, in the absence and without the knowledge of the maker takes a note in good faith, without notice of the maker's incompetency to do business and when his attention is not likely to be ought not to be sustained except upon clear proof that when actually made it had the assent of the maker.⁸⁹ The addition of an interest clause without an endorser's consent releases him even as against a *bona fide* holder, whether the endorsement be in blank or not,⁹⁰ but an endorser's consent to an alteration need not be in writing.⁹¹ Where the name of a second endorser was inserted as a payee in the body of the note, without the knowledge or consent of the endorsers, both were held released.⁹² And where the words "10 per cent" were added to a blank interest clause, without authority, it was held to constitute a valid defense in favor of the maker, even against a *bona fide* purchaser of the note, and that the note was thereby rendered void, and the maker could not be held liable to pay the note as originally drawn.⁹³

The burden of proof is on the plaintiff to show that the note in the shape in which he produces it and has declared on it, was in fact executed and delivered by the defendant.⁹⁴

The maker of a note is not injured by having the name of a surety added, without his consent, and, such an addition does not invalidate the note.⁹⁵ And the addition of "or bearer" after the payee's name in a note subject to the conditions of a mortgage payable on contingencies, does not operate as a release.⁹⁶ So, the addition of "annually" to the interest clause of a note payable in less than two years, is not a material alteration.⁹⁷

⁸⁷ F. & M. Bk. v. Butler, 48-192.

⁸⁸ Schoulters v. Allen, 51-529.

⁸⁹ Swift v. Barber, 28-503.

⁹⁰ Bradley v. Mann, 37-1.

⁹¹ Stewart v. First Nat. Bk., 40-348.

⁹² Aldrich v. Smith, 37-468.

⁹³ Holmes v. Trumper, 22-427.

⁹⁴ Willett v. Shepard, 34-106.

⁹⁵ Miller v. Finley, 26-249. Gano v. Heath, 36-441.

⁹⁶ Goodenow v. Curtiss, 33-505.

⁹⁷ Leonard v. Phillips, 39-182.

VII. PAYMENT.

After maturity, payment is presumed, unless a contrary presumption is raised by the production of the note, or when the note itself cannot be produced, by other evidence repelling the presumption of payment.⁹⁸ So, if a note, according to a mortgage, is not produced or accounted for, payment is presumed as against the party setting up the mortgage.⁹⁹

Endorsements on a note, unexplained, are held to prove payment as against the *holder* of the note;¹⁰⁰ but not against the *maker* so as to take the case out of the operation of the statute of limitations.¹⁰¹ Payment by one joint maker, or by the estate of one joint maker, does not prevent a co-promisor from taking the benefit of the statute of limitations.¹⁰² So, the right of action *may* be barred as to one maker and the other held alone.¹⁰³

It has been held that *prima facie* outlawry does not prevent the introduction of a note in evidence, when the declaration is on the common counts and a copy of the note has been served with it.¹⁰⁴ But it cannot be revived by applying on it a payment not intended to be made upon it, nor supposed to be so by the parties.¹⁰⁵

VIII. ACTIONS ON BILLS AND NOTES.

The statute allowing the parties to negotiable paper to be joined in one suit¹⁰⁶ does not change the nature of each one's liability.¹⁰⁷ The contracts of the maker and endorser being several, a joint judgment is not authorized when lawful service has been made on only one of them¹⁰⁸ and the statute does not contemplate severance in the case of joint makers.¹⁰⁹ When the obligation is joint and several, either all must be proceeded against jointly, or each sev-

⁹⁸ *Bailey v. Gould*, Walk. Ch., 478. *George v. Ludlow*, 66-176.

⁹⁹ *Bassett v. Hathaway*, 9-28.

¹⁰⁰ *Morris v. Morris*, 5-171.

¹⁰¹ *Howell*, Sec. 8727. *Mich. Ins. Co. v. Brown*, 11-273. *Rogers v. Anderson*, 40-290. *Snyder v. Windsor*, 44-140.

¹⁰² *Rogers v. Anderson*, *supra*. *Holecomb v. Sloan*, 39-173. *Gates v. Fisk*, 45-522. *Howell*, Sec. 8780.

¹⁰³ *Howell*, Sec. 8727. *Reading v. Beardslee*, 41-123.

¹⁰⁴ *Michael v. Tuttle*, 37-502.

¹⁰⁵ *Krone v. Krone*, 38-661.

¹⁰⁶ *How. Stat.*, Sec. 7345.

¹⁰⁷ *Sherman v. Palmer*, 37-509.

¹⁰⁸ *Church v. Edson*, 39-113. But see *Story v. Burd*, 8-816.

¹⁰⁹ *Reading v. Beardslee*, 41-123.

erally, unless one has been discharged in bankruptcy or is an infant.¹¹⁰ And where suit is brought against a maker and joint makers (endorsers before delivery) a discontinuance as to the maker operates as a discontinuance against the others.¹¹¹ Under that statute, however, a suit may be brought against *all* the parties to a note, including guarantors of payment, without any special allegation in the declaration. and in such an action judgment may be taken against any one of the parties against whom plaintiff could have proceeded separately, and no other party except a joint contractor to the paper can complain of failure to take judgment against some one else.¹¹² But where two *joint* endorsers are sued, a judgment cannot be entered against one and in favor of the other, where the plea was joint and there had been no severance of liability by bankruptcy or otherwise. The discharge of one surety is a discharge of both.¹¹³

It has been seen that an assignment of a note is quite different from a transfer by endorsement. It is held that the statute which authorizes the assignee of certain paper to sue in his own name,¹¹⁴ applies only to paper *not* negotiable, and that an assignee of negotiable paper, who is not also an endorsee, not only takes subject to equities but must sue in the name of his assignor.¹¹⁵ But in a case where the assignee of a negotiable note subsequently transferred it to another for value and before maturity, by simple endorsement,¹¹⁶ it was held that the endorsee might sue in his own name. It was insisted that the assignment made the note thereafter non-negotiable, but the court reasoned that if that was true then the assignment entitled plaintiff to sue in his own name under the statute above cited, and if negotiability was not destroyed by the assignment, then the assignee's endorsement entitled the endorsee to sue in his own name as in the case of any ordinary endorsement. (This leaves an open question, whether an endorsee from such an assignee may become a *bona fide* holder.)

A non-negotiable note may be sued by a *payee* in an action on

¹¹⁰ *Fay v. Jenks*, 78-313.

¹¹¹ *Fay v. Jenks*, 78-313.

¹¹² *Phelps v. Church*, 65-231. How. Stat., Sec. 7355.

¹¹³ *Seligman v. Gray*, 66-341.

¹¹⁴ How. Stat., Sec. 7344.

¹¹⁵ *Redmond v. Stanley*, 24-445. *Robinson v. Wilkinson*, 38-301. *Matteson v. Morris*, 40-55.

¹¹⁶ *Stevens v. Hannan*, 86-305.

the common counts.¹¹⁷ A note payable to C. T. Allen, Cashier, or order, indicates it is payable to him as a bank officer, and the bank may sue on it without endorsement by the officer.¹¹⁸ And title is sufficiently made out as against the maker, if it appear that the plaintiffs are successors to the firm to which the note is payable, and proof of endorsement is needless.¹¹⁹ A note payable to a certain named person "or bearer," may be sued by any holder, without endorsement.¹²⁰

Numerous cases have arisen involving a construction of Rule 79 requiring an affidavit of non-execution. The rule was first sustained in *Railroad Co. v. Edson*,¹²¹ citing *Pegg v. Biddleman*.¹²² If in a suit on a firm note no affidavit is filed with the plea, the partnership need not be proved.¹²³ But an affidavit by one of two partners or by one of two joint makers is sufficient to put the execution and validity of the note in question.¹²⁴

The word "execution" in the rule means only its actual making and delivery,¹²⁵ and no affidavit is necessary in order to show want of capacity to execute the note except for a particular consideration,¹²⁶ nor to make a defense on the merits not involving execution, as a showing by an endorser that he signed after delivery and without consideration.¹²⁷

The affidavit casts on the plaintiff the burden of proving execution, and if the instrument was drawn by an agent, the agent's authority.¹²⁸ And in *Anderson v. Waller*,¹²⁹ it was held that an affidavit admitting that the signature appeared to be defendant's but averring that it was obtained by fraud, was sufficient to put plaintiff to proof of execution and delivery. The affidavit will not be technically construed, and defendant must have had an opportunity to file one.¹³⁰

¹¹⁷ *Railway Co. v. Potter*, 55 627. *Brown v. McHugh*, 35-50.

¹¹⁸ *Garton v. Union Bk.*, 33-279.

¹¹⁹ *Gray v. Wilcox*, 56-58.

¹²⁰ *Bitzer v. Wager*, 83-223.

¹²¹ 41-673.

¹²² 5-26.

¹²³ *Lobdel v. Bank*, 33 408.

¹²⁴ *Haight v. Arnold*, 48-512. *Wren v. McDaren*, 48-197.

¹²⁵ *Freeman v. Ellison*, 37-459.

¹²⁶ *Kenton v. McClellan*, 43-564.

¹²⁷ *Freeman v. Ellison*, *supra*.

¹²⁸ *Iron Mine v. Bank*, 44-344.

¹²⁹ 34-113.

¹³⁰ *Haight v. Arnold*, 48 512. *McMillan v. Beach*, 38-397.

THE LAW OF SCHOOLMASTER AND PUPIL AS TO PUNISHMENT.

WILLIAM P. BORLAND.

This topic of the law, with the subjects included under it of husband and wife, parent and child, guardian and ward, and master and servant, is of comparatively modern origin and growth, and recent statutory enactments have so changed its principles and introduced so many new rules that the full force and effect of these altered rules and principles, in all their ramifications, are but imperfectly understood by the profession and stumblingly applied by the courts. Modern as this subdivision of the law is, there is one branch of it,—that of master and servant,—which has almost wholly ceased to exist as a domestic relation. The greater part of the law on this particular branch grew out of, and was applicable to, the apprentice system which was in vogue in the last century, and as that system has passed away with our advancing civilization, there has grown up in its place, founded partly upon the parental education and partly upon the enlarged views of the duty of the state to its citizens, an entirely new branch of the law of domestic relations, the law of schoolmaster and pupil.

It is remarkable that, with all the text writers who are constantly busy adding to already unwieldy volumes of legal literature, this subject has been left almost untouched. The first congress of the United States passed the celebrated Ordinance of 1787 for the government of the territory northwest of the Ohio River in which the interest of the state in the education of its citizens is expressed in the words which are fittingly inscribed above the platform of the main hall of the University of Michigan: "Religion, Morality and Knowledge being necessary to good government and the happiness of mankind, Schools and the means of Education shall forever be encouraged."

From the impetus thus given, there has grown up all over our country, and particularly in the west, a vast and comprehensive system of public schools, ranging all the way from the rural district school to the state university. It is to this system that most

of the law upon this subject applies and which raises this branch of our jurisprudence to its present importance.

Henry Clay is said to have dubbed the protective tariff "the American System." He should have reserved the name for that system of public instruction which, while not confined exclusively to this country has yet reached here its highest development in the greatest good to the citizen and the increased political security of the state. It seems peculiarly adapted to our institutions and may indeed be called "the bulwark of the republic." The youthful American there finds himself in a sphere where there are no distinctions except those founded upon intellectual attainments, learns to appreciate his real significance or insignificance in the community, and from an early age, absorbs those broadening ideas of the power and grandeur of human life, from whatever environments it may spring, which is the distinguishing trait of American life and character.

The foundation of the authority of the schoolmaster is the power delegated to him by the parent. He is primarily an agent of the parent charged with the execution of a part of the duty enjoined by law upon the parent, that of educating the child. Blackstone says: "The father may delegate part of his parental power, during his life, to the tutor or schoolmaster of his child, who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz, that of restraint and correction, as may be necessary to answer the purpose for which he is employed."¹ And the same is laid down in Kent: "The power allowed by law to the father over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of education."² It seems clear in the first place that this delegated power includes the right of correction and restraint. In 2 Addison on Torts, p. 727, it is laid down that moderate correction by parents, schoolmasters, masters of ships, etc., is justifiable in an action for assault and battery. Blackstone says: "Battery is in some sense justifiable or lawful; as, where one hath authority, a parent or master, gives moderate correction to his child, a scholar or his apprentice."³

But the first question that confronts us is, how far does this power over the child's person extend? And upon this question

¹ 1 Blackst. Com., 453.

² 2 Kent Com., 205.

³ 1 Blackst. Com., 120; 1 Russell on Crimes, 755; Bac. Abr. Assault & Batt. O.

there has grown up, within the last century, a remarkable change in public sentiment which has been followed, as is inevitable, by a change in the rules of law, which marks one of the most curious and interesting features in the evolution of English law. It was in 1772 that Boswell, afterwards the biographer of Dr. Samuel Johnson, was counsel for a schoolmaster in Scotland who was to be deprived of his office for severity to one of his pupils. The case was submitted by him to Dr. Johnson for an expression of an opinion, and that kindly philosopher gave vent to the best spirit of his age as follows: "The government of a schoolmaster is somewhat in the nature of a military government; that is to say, it must be arbitrary, it must be exercised by the will of one man according to particular circumstances. A schoolmaster has a prescriptive right to beat and an action of assault and battery cannot be admitted against him unless there be some great excess, some barbarity. In our schools in England, many boys have been maimed, yet I never heard of an action against the schoolmaster on that account. Puffendorf, I think, maintains the right of a schoolmaster to beat his scholars."⁴

It is a well settled rule of law that the power of a parent over the person of his child is limited only by the ideas of humanity current in the place and age. He must always be the sole judge as to the occasion for punishing and the manner of doing it; and the policy of the law will not permit any man or set of twelve men to interfere so long as the parent keeps within the bounds of humanity and does not punish with malice or inflict lasting injury. So much of this power is confided to the schoolmaster as is necessary for the due execution of his peculiar office; but what is necessary may differ greatly with circumstances. It is clear that when a child is sent to a school at a distance from his home where he is to live in the family of the master, a greater degree of control is delegated to the master than where the child merely attends a day school at certain fixed hours, being otherwise under the direct control of his parent. In the elaboration of this rule two theories have grown up in the courts. The first is that the schoolmaster's authority over the person of the child is, within his proper sphere, as broad as that of the parent, and in inflicting corporeal punishment he acts judicially and the occasion and the manner of punishing cannot be questioned in court unless

⁴ Boswell's *Life of Johnson*, Vol. 2, p. 89.

he acts with malice or oversteps the bounds of humanity. The earliest case in this country is the leading authority on this theory.⁵ This rule is said to have been followed in *Commonwealth v. Seed*,⁶ and to have controlled the decision in *State v. Burton*.⁷ This latter was not however a case of corporeal punishment. It is also the rule laid down in Reeves on Domestic Relations.⁸ The other theory is that in inflicting corporeal punishment, a teacher must exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offense, the age, size and apparent powers of endurance of the pupil, and that the whole question is one for the jury. The leading case under this rule is *Commonwealth v. Randall*,⁹ which is followed in *Boyd v. the State*.¹⁰ Although this rule would seem to be a direct innovation upon the common law and to have the effect of drawing a distinction between the authority of a master and that of a parent, which has not before been drawn, yet it would seem to be the better rule and more applicable to the changed circumstances of the case. However reasonable the former rule may have been in the era of small private schools, when the instruction of each pupil was a question of direct contract between the parent and the master, it does not seem to be so now that the parent has less control over the choice of a master. The schoolmaster is no longer a mere agent of the parent, but, as intimated in *Stevens v. Fassett*,¹¹ he is in part also an agent of the state, a public officer. Nor is it just to the master to thrust such a responsibility upon him. The schoolmaster is still so far regarded as standing *in loco parentis* that the presumption, in all cases in which his discipline is called in question, is that he acted properly and within the scope of his authority, and something more is necessary to be shown beside the mere fact of punishment to rebut such presumption.¹²

It has also been decided that where one is a schoolmaster *de facto*, he has the same right to maintain discipline although his

⁵ *State v. Pendergrass*, 2 Deaveraux & B. L., 365. S. C. with note, 31 Am. Dec. 416.

⁶ 5 Pa. L. J., 78.

⁷ 45 Wis., 150.

⁸ p. 288.

⁹ 4 Grey, 86.

¹⁰ 88 Ala., 169; *State v. Mizner*, 45 Ia., 248. The rule expressed in it is also laid down in *Cooper v. McJunkin*, 4 Ind. 290; *Gardner v. The State*, 4 Ind., 632; *Anderson v. The State*, 3 Head, 455.

¹¹ 27 Me., 266.

appointment be defective.¹³ And where a pupil over twenty-one years of age voluntarily attends school, he must submit himself to its discipline and may be corporeally punished as if he were a minor.¹⁴ It seems, also, that the teacher, in a proper case, may call in the assistance of a third person to maintain discipline, and to eject a refractory pupil, and such third person will be protected in rendering such assistance.¹⁵ This is especially important in view of the large number of young lady teachers in the public schools.

The courts, however, set a strict limit to the authority of the teacher to punish corporeally and will not, under any circumstances, extend it so far as to conflict with the parent's control. This results from the principle that the master is the agent of the parent.¹⁶ In *Morrow v. Wood*, where the parent had expressly forbidden the child to take a certain study, it was decided that the teacher could not punish him corporeally for obeying the parent, although the study was part of the required course. Contrasting strongly with the opinion of Dr. Johnson in the last century are the views as to corporeal punishment expressed in *Cooper v. McJunkins*,¹⁷ decided in 1853: "One thing seems obvious. The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of his vocation, namely, school government. For such a teacher the nurseries of the republic are not the proper element. They are above him. His true position will readily suggest itself. It can hardly be doubted but that public opinion will, in time, strike the ferule from the hands of the teacher, leaving him as the true basis of government only the resources of his intellect and heart. Such is the only policy worthy of the state and of her otherwise enlightened institutions. It is the policy of progress. The husband can no longer moderately chastise his wife, nor according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy with his shining morning face should be less sacred in the eye of the law than that

¹² *Danenboffer v. State*, 69 Ind., 295; *Patterson v. Nutter*, 78 Me., 509; *Anderson v. State*, 3 Head, 455; *Lander v. Seaver*, 32 Vt. 114.

¹³ *Kidder v. Chellis*, 59 N. H., 473.

¹⁴ *Stevens v. Fassett*, 27 Me. 266.

¹⁵ *State v. Williams*, 27 Vt., 755.

¹⁶ *Morrow v. Wood*, 35 Wis., 59.

¹⁷ 4 Ind., 292.

of the apprentice or sailor, is not easily explained. It is regretted that such are the authorities, but courts are still bound by them. All that can be done without the aid of legislation is to hold every case strictly within the rule, and if the correction be in anger or in any other respect immoderately or improperly administered, to hold the unworthy perpetrator guilty of assault and battery."

The province of a judge is, of course to determine what the law is and not what public sentiment is. The latter he ~~must~~ leave to the watchful eye of the legislature. It seems however, that the decision in this case was strictly within the rules of law, in spite of the extreme views expressed. But the tendency of the courts undoubtedly is to narrow the right of corporal punishment, and indeed the very adoption of the rule in *Com. v. Randall*, has the effect of restraining its exercise, as a schoolmaster will hesitate to take upon himself the responsibility of punishing when he knows that his act, garbled, perhaps, and distorted by clever counsel, is to be afterwards reviewed by a jury who, from the very nature of the case, will have their feelings very much involved.

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CAN a Seventh-Day Adventist, who has been serving on a jury and refuses to attend court on Saturday, be forced to perform jury duty on that day? Will the court be compelled to adjourn the case from Friday till Monday? We know of such a case, and we cannot see how the law can force the members of a sect, which observes the sabbath on a day different from the christian sabbath, to perform duties on that day which are forbidden on the christian sabbath. Would not the Seventh-Day Adventist be in somewhat the same position as the Jew who, according to Judge Cooley, "when forced to observe the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and by forcing him to keep a second sabbath in each week, unjustly, though by indirection, punishes him for his belief." Would not the Seventh-Day Adventist, who is forced to do jury duty on his sabbath, be discriminated against in his religious belief?

THE report in this number of the proceedings and addresses at the presentation of the portraits of Professors Campbell and Walker to the law department of the University, constitutes a valuable memorial of the occasion. The purchase and hanging of these portraits in the law lecture room is a graceful tribute of the law alumni of the early days of the school to two of their instructors in the elementary principles of the law. The alumni of the University of Michigan are not conspicuous for such demonstrations of interest in their *Alma Mater* as this. The example of the law alumni is worthy of imitation, in the same and other directions, by the alumni of other departments.

The portraits of Professors Campbell, Cooley, and Walker,

composing the first faculty of the law school, hang above the rostrum, and it would be difficult to select three names more illustrious in Michigan legal history which stand for so much that is inspiring and stimulating to students of the law. Those who originally moved in the matter of obtaining these portraits were Claudius B. Grant, class '59, justice of the supreme court; Don M. Dickinson, class '67; Henry A. Chaney, class '71; and Edward W. Pendleton, class '72. A letter was sent to a large number of the early students of the department and so many favorable responses were received that L. T. Ives of Detroit was commissioned to make the portrait of Judge Walker from life and to copy the likeness of Judge Campbell hanging in the supreme court room, C. M. Burton of Detroit generously assuming the payment of one of these portraits. The addresses of Judge Grant, Judge Cooley, Dean Knowlton, President Angell and Professor Griffin will be found interesting reading to old students of the law school.

THE following is a new circuit court rule:

CIRCUIT COURT RULE 107. Circuit courts shall have jurisdiction, within their respective counties, in all mandamus proceedings, involving the action of any officer or board of any county, township, city or school district, or of the common council of any city or village, and the action of any private corporation or officer or board thereof. Said circuit courts shall also have jurisdiction to issue writs of certiorari in all cases where they may now be issued by the supreme court to probate courts, circuit court commissioners and justices of the peace, or any corporate body or officer thereof. Writs of certiorari and orders to show cause in cases of mandamus, shall be made returnable and service thereof made within such time as the circuit courts shall upon each application direct. Adopted May 31, 1893.

THE powers of law school faculties is passed upon in an interesting New York case. Thomas O'Sullivan, a student in the New York Law School, applied for a peremptory writ of mandamus directing the dean, George Chase, to sign his diploma as graduate of the school. Mr. O'Sullivan, as one of a committee of students to arrange for the commencement exercises on the occasion of conferring the degrees, remonstrated with Mr. Chase because it had been determined to ask Bishop Doane, by whom, as one of the regents, the degrees were to be conferred, to conduct religious exercises. Mr. Chase, in his answering affidavits, in the mandamus proceedings, gave his version of an interview he had with Mr. O'Sullivan at that time. The writ of mandamus was refused. The appellate court, Judge Follett giving the opinion, holds that Mr. O'Sullivan, by taking a peremptory writ, has admitted the truth of these answering allegations, and the sole question, there-

fore, was whether the conduct described justified the dean in refusing his certificate to the relator. "Assuming," says Judge Follett, "that the relator's conduct is correctly stated by the dean, as we must, it was, to say the least, contumacious and calculated to breed disorder and trouble in the school. That there should be some power vested in the faculties of schools and colleges to repress and punish such conduct will be conceded by all. . . . To hold that dissatisfied students in the colleges and schools of this state can review the discretion of faculties in the cases where the facts justified the exercise of discretion, would be unwise. We see no reason why the right to discipline is not as great between the final examination and graduation as before; and if we can control the action of the faculty in this case, why may we not be called upon to supervise it in the case of expulsion or suspension of students during their college course? Notwithstanding the right of the school to refuse to recommend the relator as worthy of a degree, he is entitled to a certificate of attendance, and that he passed a satisfactory examination." In other words, the dean can refuse to sign the diploma, but is required to give a certificate of attendance and the passage of a satisfactory examination.

THE feeling is quite general among the members of the Michigan bar, that the standing of our law reports is not as high as formerly. Outside the state the fact is notorious. There was a time when a decision of the supreme court of Michigan commanded in any jurisdiction nearly the same respect as a decision of the United States supreme court. What has been the cause of this decline? The principal cause of this inferiority is likely to be found in the method of transacting business. Instead of gathering about a table, as the judges did in the days of Cooley, Campbell, and Christiancy, and there discussing the cases, and afterwards assigning to different judges the task of writing decisions, previously determined, the present plan is to divide the cases, and each judge, without consultation with the others, prepares the opinion of the cases apportioned to him. Of course the opinion is sent to the other judges for their concurrence, which concurrence is nearly always forthcoming. The fact that there are no dissenting opinions in these days denotes an unhealthy condition. The new law, requiring the judges to reside at Lansing, is a move in the right direction, and may remedy the faults of the present practice, and tend to restore the Michigan reports to the high position they are fast losing. Instead of pocketing decisions and hastening away every Saturday evening, the judges will have, under the new law, at least one day, Monday, to talk over the cases. It is to be hoped that the plan followed when our best decisions were rendered will be restored. The increased salary will probably have the effect of attracting higher talent to the

supreme bench, but further than this its effect should be immaterial. When a judge accepts a position, at any salary, he should do his whole duty whatever the salary. However, seven thousand dollars per annum is not too large a compensation for such men as now occupy the position, men capable of holding the highest judicial seat within the gift of any state. While the law may in special cases work a hardship by deterring competent lawyers from accepting a place on the bench, on account of the residence clause, yet it betters the present state of affairs, and on the whole is no worse than many other laws our legislature has enacted.

A CORRESPONDENT in an eastern legal publication has this to say concerning an alleged decision of a Michigan circuit judge:

"The attention of the eastern bar is often directed to the wholesome and vigorous method of the Western judiciary in dealing with novel questions of law, and administering justice without too much regard for hoary maxims. Occasionally, however, the independence of the court results in surprising decisions. In a recent suit in equity in the circuit court of Michigan, involving a contract for the purchase of 30,000,000 feet of timber, the complainant, an assignee of the purchaser, sought to avoid the effect of a foreclosure by reason of his failure to perform his contract and to have the contract declared fraudulent, and to compel the vendors practically to make a new contract at a loss of many thousand dollars. The agreement between the original parties contained a clause expressly declaring that 'time is and shall be deemed as of the very essence of the contract,' and providing that in case of any default the parties of the second part should 'lose and be debarred from all rights, remedies or actions, either in law or in equity, upon or under the contracts.' . . . The 'Chancellor' passed over the time clause in the contract, with the remark that clauses of that character, he was 'informed from the books, have but little influence in restraining the action of a court of equity when endeavoring to administer justice, and that *even in the absence of fraud or other heads of equity jurisdiction*, complainant could maintain his bill for specific performance, notwithstanding such forfeiture.' And the humor of the case (to all save the defendants) is found chiefly in the following portion of the opinion, relating to fraudulent representations: If this view is *not justified from the evidence*, it must have *sprung from my imagination*, because I seriously entertain it and *must have received it from some source.*"

We are forced to the conclusion that this refreshing tale is not history but fiction, for Michigan has not boasted a "Chancellor" since 1847, when Elon Farnsworth was legislated out of office and his court out of existence by the revised statutes of 1846, the chancery jurisdiction vesting in the circuit courts. If,

however, the correspondent is a stranger to our legal history and has mistaken one of our circuit judges for a chancellor, there may be some truth in what he charges. It is apparently a case of imagination versus evidence, but we cannot believe that there is a Michigan circuit judge who could have written the last sentence in the above communication.

THE report upon another page of Dr. Vaughan's lecture upon his own expert testimony in the Buchanan murder trial in New York city will be read with especial interest by lawyers at this time because of the attacks upon medical experts and their testimony which are now becoming quite frequent in the legal and secular press. The charge is freely made that physicians, who have reputations as experts in toxicology and blood analysis, sell themselves to litigants in damage cases or to the prosecution or defense in criminal, and especially murder, trials. The spectacle is not a rare one nowadays, of two eminent medical specialists testifying in the same case, and the testimony of one diametrically opposed to that of the other, where the circumstances submitted to each for his opinion are identical. It is alleged also that the employment of medical experts, who can command and who actually demand large fees, is a species of bribery of witnesses. The law provides witness fees, and if the opinion of a physician is desired he can be brought into court by legal process, that is by subpoena. If he is paid a large fee by the party who brings him into court as a witness, he is expected to do something to earn that fee, and as a consequence his opinion as an expert will be looked upon with suspicion, and the more expert he is, the more successful he will be in befogging the judgment of the jurymen.

While there is much that is open to criticism in the present day methods of introducing opinion evidence, it is not just that medical experts should be singled out for attack. No one, for instance, will question for a moment the entire honesty and scientific accuracy of Dr. Vaughan's testimony in the Buchanan trial. His positive contradiction of the stand taken by the most distinguished chemists and physicians New York city could afford, and the undeniable proof of the falsity of their conclusions, and the demonstration by actual experiment in court of the truth of his own conclusions, will dispel any suspicions which any one may entertain that Dr. Vaughan's testimony was colored by the influence of a large fee.

A few unscrupulous physicians have brought discredit upon their profession by "hiring out" as experts, and manufacturing opinion evidence to order, but the charges that are being so freely made, have no more basis of truth than similar charges made against experts in the detection of handwriting, inks, and the numberless mechanical experts. Opinion evidence is desirable and

at times indispensable, and always will be. The problem is, how to guard it from being warped and distorted by inviting fees or other influences.

JUDGE COOLEY'S article in the April number of this journal, on "The Power to Amend the Federal Constitution," has attracted widespread attention. Among other journals which have commented upon it, the *New York Law Journal* says that the article, "like every other production by that distinguished jurist, stimulates thought and challenges discussion. After calling attention to the fact that the federal constitution contains but a single express limitation of a permanent character upon the right to amend it (the prohibition against taking from the states the right to an equal representation in the senate), the author passes to an interesting discussion of implied limitations upon the right of congress and the states to amend our fundamental law. . . . He shows that all the amendments thus far adopted have been in the direction of further advancing democratic institutions and have looked towards extending the original purpose of the constitution itself." Judge Cooley, in his article, it will be remembered, suggested a number of amendments which three-fourths of the states might force upon the remainder, by reason of local prejudice or for other reasons, viz: "To expel the other fourth from the Union; to establish a rule of taxation bearing heavily upon one section of the country; to create a nobility, a privileged class; or to build up a hereditary monarchy, by a series of amendments. All of these things, he thinks, are possible by amendment of the constitution. The editor of the *New York Law Journal*, however, criticises Judge Cooley's suggestions as follows; "It would probably have to be admitted that the illustrations given by Judge Cooley are of a very speculative character. The modern trend of government is towards an extension of democracy and equality, and the possibility of the serious proposal of any of the amendments suggested is exceedingly remote." His own view of the matter is that "the doctrine of extra-constitutional powers and restraints must be recognized within certain limits. . . . We do not see why the doctrine of implied restraints, determinable by fair inference from the express letter of the constitution should not be entitled to equal respect and authority with the doctrine of implied powers derived from the same source." In other words, the editor of our New York contemporary is of the opinion that the supreme court of the United States will, or should, at least, save this country from the things that Judge Cooley suggests might come to pass by amendments to the constitution backed by the votes of three-fourths of the states, and from other things equally as undesirable and dangerous, by declaring them unconstitutional under a doctrine of implied restraints, just as amendments have been pronounced constitutional under the doctrine of implied powers.

TELEPHONIC AFFIDAVITS.—Our contemporaries have taken up our query as to the validity of affidavits sworn to over telephone and discussed it quite thoroughly. Evidently no court has been squarely confronted with the question. The first to whom it is presented, however, will find that the law journals have decided the question, and unanimously held such affidavits invalid. We give some of their "decisions" below. The *Albany Law Journal*¹ says:

"The MICHIGAN LAW JOURNAL asks: 'Can an affidavit be legally sworn to over a telephone? We do not know that any court has yet been called upon to answer this question. But it is only a question of time when the point may be raised. To our certain knowledge the practice prevails to some extent. It is, to say the least, questionable whether the subscribing notary can legally say that the affiant 'personally appeared,' in the real meaning of the jurat. It is extremely doubtful whether an affidavit or verification so made would be held sufficient if put to a legal test.' We think the JOURNAL is quite correct in its doubts. The rule is that the officer and affiant must be face to face. This is substantially held in *Case v. People*.² Case was president of a life insurance company, and was accustomed to sign reports required by law to be verified, and send them by a messenger to a neighboring notary, who without seeing him or swearing him, affixed his signature to the certificate. This was held not to be a valid affidavit of which perjury could be predicated. Of course in the case supposed there is the form of administering the oath, which did not exist in the case cited, but how can an oath be intelligently administered unless the affiant is personally present? No one would contend that the action could be made binding by letter through the mail, and yet that would be as authoritative as a telephonic communication. How can a legal officer get jurisdiction of a person who is not present before him? There are many things done in this 'hustling' age which will not 'hold water,' and this thing is one of them."

The *New York Law Journal*³ next takes up the question and makes the following somewhat lengthy comment:

"A question which at present seems to be agitating many people, in the profession and outside of it, is whether affidavits may be validly taken by telephone. It appears that the custom of verifying documents by this method has been to quite a considerable extent adopted, especially in the western states. Extracts from newspapers calling attention to the innovation have been forwarded to us by correspondents, with requests for our views on the subject. The *Albany Law Journal* and the MICHIGAN LAW JOURNAL have declared against the practice, and we are

¹ Vol. 47, p. 301 (April 22)

² 76 N. Y., 242.

³ Vol. 1, p. 268 (May 1.)

inclined to agree with them. In *Morton v. Hange*⁴ it was held that, in the absence of a rule of court or statute requiring it, a subscription to an affidavit by the affiant is not necessary. In *Jackson v. Virgil*⁵ it was decided that an affidavit beginning with the deponent's name, without being subscribed by him, is sufficient. In *Hathaway v. Scott*⁶ it was held that the practice in the court of chancery, founded on a positive rule made as early as 1661, and universally followed, required the deponent's signature to an affidavit for use in that court. The general rule in this state undoubtedly is that an affidavit must be signed by the deponent, as well as certified by an officer administering the oath. While it is not necessary for the affiant to actually sign it in the presence of the notary, yet in New York and other states where deponent's signature is required, the rule probably contemplates at least the personal identification of the signature by him before the notary. The affiant could of course call the attention of the notary by telephone to a signature already made and forwarded by messenger, orally identifying the document so that no reasonable doubt would exist. The practical situation would be much the same if the notary happened to be personally familiar with the affiant's handwriting. But the traditions are to construe criminal laws technically in the prisoner's favor, and in the case of an oath positively required to be signed it is not improbable that a prosecution for perjury would fail if the signature were not made, or identified and adopted in the physical presence of the officer. But, whatever might be held about the signature, it seems that the law contemplates the physical presence of the affiant before the notary at the time of taking the oath. The administration of an oath is a ceremony; it is nothing but a ceremony. The intention is that by some purely formal observance, which the affiant considers most binding upon his conscience and which to other persons may be ridiculous, he shall signify that the statement in question is made with a peculiar solemnity. We believe that the law contemplates the physical presence of the affiant before the officer, because the latter must be satisfied that such ceremony as the former designates as morally most obligatory on him—whether kissing the Gospels, uplifting the hand or what not—is observed.⁷ If all mankind were Quakers, an argument of much plausibility might be formulated for the administration of oaths by telephone. No ceremony of any sort is employed in their case; they simply affirm to the truth of the affidavit. If such a person be in telephonic communication with a notary with whom he is acquainted, so that they recognize each other's voices, they are brought into direct personal contact, and their minds may meet as perfectly in the

⁴ 47 Minn., 405.

⁵ 3 Johns, 539.

⁶ 11 Paige, 173.

⁷ O'Reilly v. People, 86 N. Y., 154.

administration and taking of an oath as if they stood face to face. Herein lies a distinction between affidavits made by telephone and that considered in *People v. Case*.⁸ In the case cited, the question was whether a paper could be treated as a valid affidavit which was signed by the party intending to verify it and sent by messenger to a notary, who signed and certified it without having any direct communication with the affiant whatever. Nevertheless, the general policy of the law is to require some ceremonious performance in oath-taking, and consequently, as we think, to require the physical appearance of the affiant in order that the officer may be satisfied that the oath is duly administered. As general legal policies can be given effect only by general rules, probably the physical appearance of all persons would be required before officials administering oaths, although as to members of certain sects, and granted the circumstance of personal acquaintance and recognition, no substantial reason could be assigned for it."

In agreeing with the foregoing *The Legal Adviser*⁹ facetiously remarks:

"Some of our legal confreres are seriously considering the question whether an affidavit or acknowledgment under oath of a signature can be legally sworn to over a telephone. The question involves others. Can the notary truly say that the affiant 'personally appeared' before him? Can he say that the person who is 'helloing' at the other end of the wire is known by him to be the person who signed the instrument? The editors of the MICHIGAN LAW JOURNAL aver that to their 'certain knowledge the practice prevails to some extent.' We may add that to our certain knowledge the practice of swearing over, and at, and in relation to, the telephone prevails to a great extent, and in all probability will increase until the hello machine and its service are materially improved. This is, however, illegal swearing. That legal swearing can be lawfully done by the agency of that device for the promotion of profanity, in its present state, is most improbable."

⁸ 76 N. Y., 242.

⁹ Vol. 33, p. 136 (May 3.)

LAW SCHOOL NOTES.

PROF. E. F. JOHNSON, EDITOR.

HENRY C. WALTERS, ASSISTANT.

On Thursday, May 11th, Judge C. B. Grant, of the supreme court of this state, formally presented the law department with portraits of the late Judge J. V. Campbell, and Judge C. I. Walker, of Detroit. These gentlemen, together with Judge Cooley, constituted the first faculty of the department. Those present will not soon forget the thrill of pleasure they felt, and the thunderous applause they heard, when, in company with the younger distinguished gentlemen, the venerable Judge Cooley took his place on the platform. The two pictures hung, one on each side of Judge Cooley's, which has graced the lecture room for some time. They are life size, and done in oil, that of Judge Walker being a three-quarter front view, and Judge Campbell a profile. They are said by those acquainted with them to be excellent likenesses.

Dean Knowlton introduced Judge C. B. Grant, who spoke as follows:

YOUNG GENTLEMEN: To me this room seems like a hallowed place. Twenty-eight years ago I sat where you now sit and with me sat many who after four years of war returned here to prepare for the pursuits of peace. It was our good fortune to receive our first instruction in the law from Professors Campbell, Cooley and Walker, who were the first professors in this department of the university, and under whose guidance it rapidly rose to the front rank among the law schools of this country, a rank which I am happy to believe is still held. The regents wisely chose the men upon whom was devolved the duty to launch this department and place it upon a secure and permanent basis. They were men of strong character, indefatigable energy and industry, rugged honesty, were learned in the law, honorable in the practice of a noble profession and their private lives were beyond the breath of suspicion. I speak not words of fulsome praise but those of truth and soberness.

Professor Cooley, whose treatises are authority in all the English speaking nations of the world, and are probably more frequently consulted and cited than any other by the profession in America, is still with us and I believe retains his connection with this department. May God, for your sakes, young gentlemen, spare him many years of life, so that his appearance before you, infrequent though it must be, may still be an inspiration to you in your preparation for your life work.

Professor Campbell has gone from among us and entered into that mystery called life eternal. It would be an act of supererogation to here speak at any length of his life and character. His associate upon the bench, members of the profession who knew him intimately, and the university senate have placed upon record their estimation of him as a lawyer, professor, judge and man. You will find this record in the 81st Michigan Report and in your search for a model I commend it to your careful reading.

Professor Walker still lives and his venerable form is still seen upon the streets of the city of Detroit, where he has been a conspicuous figure

for forty-three years. His work however is done and in his eightieth year he lingers upon the bank of the dark river awaiting in the christian faith the summons to be carried over. For the purpose I have in view to-day it is proper to state a few leading facts in his life for which I am indebted to one who has been his life-long associate and friend. He was born at Butternut, Otsego county, N. Y., April 25, 1814. His father was a carpenter and buider. The family was large. The village afforded no other educational facilities than the common district school. A small village library furnished some standard books, the most of which found their way into his father's family and were read by him. He attended a select school in Utica, for one term, after which he was employed for a short time as assistant teacher in one of its branches. This and the common school were his sole school advantages. From eighteen to twenty-one he was clerk in a store. In the summer of 1835, he was sent by his employer on a collecting tour to Illinois. He went by steamer from Buffalo to Detroit, thence by stage to St. Joseph, Michigan, and thence by steamer to the nascent city of Chicago. One of his companions upon the stage coach was Junius H. Hatch, of New York city, who had entered considerable tracts of timber land in the vicinity of Grand Rapids. In 1836, Mr. Hatch employed the young man to go to Grand Rapids and look after the land. He opened an office there and for several years attended to the business of his principal. A lyceum was established, in which he became a conspicuous debater. He was for some time the sole editor of the first newspaper published in the "valley city," was elected a justice of the peace, and while holding this office in 1838 began the study of the law.

He was a delegate from Kent county to the convention held in Ann Arbor December 14 and 15, 1836, whose business it was to give assent to the act of congress of June 15, 1836, fixing the boundaries of the new state so that it might be admitted to the Union under the constitution which had been framed the previous year. In 1840 he was elected a member of the legislature and participated in the election of Hon. William Woodbridge to the United States senate. Soon after this he went to Springfield, Mass., where he was admitted to the bar. He commenced practice at Saxton's River, Vt., and afterwards practiced at Bellows Falls and Brattleboro, where he was the partner of Hon. Dorr Bradley. While there he became a free soiler and assisted in editing a free soil paper. He came to Detroit in 1850, where his life has since been mainly devoted to the practice of the law, except one year when he occupied the important position of circuit judge. At the organization of the law school of the University in 1859, he was appointed one of its professors and filled that position for fifteen consecutive years. Without the facilities in early life for a liberal education, which cannot be too highly estimated, he yet carved his way to success, to a position of influence, to a noble manhood and to a high eminence in his profession. His career therefore stands as an encouragement to those who, like him, were deprived of a collegiate education, and yet possess courage to prepare for the practice of a profession where success can only be attained by assiduous labor.

Aside from their early education, the lives of Professors Campbell and Walker are in many respects parallel. They are parallel in their purity of character, honesty of purpose and in their one desire to correctly educate young men who came to them for instruction in the law. In fulfilling the commission entrusted to me to-day to present their portraits to this department, I deem it most essential to call your attention to the

one thing in their lives, without which they could not and would not have impressed their own characters upon so many of their pupils and won the esteem and affection of their fellow-citizens. Their lives, private and public, are open books to which you may well turn and read. You will there find written upon every page and in every line the fact that honor, honor in thought, in word, in action, was the polar star by which they guided their lives. Neither as students nor as lawyers, professors or judges were they found at the gambling table, in drunken carousals or in the debauch of the house of prostitution. They taught both by precept and example that those who indulged in these excesses, those who are actuated by dishonorable motives, have no place in a profession where honor should reign supreme. If you seek or accept public position, learn from them to seek and accept it, not for the honor it will bring to you but for the honor you will bring to it; not for the good it will do you, but for the good you may thereby do to society, your state and country.

If you remain in the practice of the law, learn from them that the sole purpose of every law suit is to reach justice by the shortest path. The true measure of their lives is not the years they lived but the good deeds they did. They illustrated that sentiment which has been so beautifully expressed:

"To thine own self be true
And it must follow as the night the day
Thou canst not then be false to any man."

Follow their example, young men, and you may be assured of a fair measure of success. But without honor as your guide the word *failure* will express the sum total of all your accomplishments.

GENTLEMEN OF THE FACULTY: I am instructed to present to you and through you to the law department and the University of Michigan these portraits of Professors Campbell and Walker. They are a gift to the university from their former pupils. We request that they be hung upon the walls of this room. In my judgment the greatest good, the noblest work, which these men and their associates accomplished was done here. Their pupils are found in every state and territory of this country as well as in foreign lands, where many of them are filling positions of trust and responsibility. We present them as an evidence that we have not forgotten them nor the university, where they labored, one for twenty years, the other for fifteen. We present them, not alone for the love and affection we bear them or to express our appreciation of their worth and virtues, or as an honorable meed of praise, justly their due, but also that their faces, so faithfully delineated upon the canvass, may serve as a perpetual reminder to those who shall gather here in the years to come, both as instructors and pupils, that the jealous mistress of the law demands from her devotees implicit obedience to the rules of honor and justice.

The judge was greeted with hearty applause upon the conclusion of his address. Dean Kewlton responded in behalf of the faculty, in the following well chosen words:

MR. CHAIRMAN AND STUDENTS OF THE LAW DEPARTMENT: In behalf of the law faculty I rise to manifest what cannot be expressed in words; our deep feeling of gratitude to the older alumni who have, spontaneously and unsolicited, volunteered this token of respect for the institution from which they were graduated and their continuing love for that memorable

faculty at whose feet they sat and whose names are to-day, over a quarter of a century after the beginning of their active services, an inspiration to every student of the department.

It seems as though their names were raised in letters of gold upon the annals of the institution. I sincerely hope that the time will never come when the students in attendance here shall cease to be inspired by the memory of the great work done here by Cooley, Campbell and Walker.

Permit me to assure you, Mr. Chairman of the committee, that these pictures, which you have so kindly presented, together with Judge Cooley's, shall hang on these walls and over this rostrum so long as these walls shall stand.

Professor Knowlton dwelt at some length upon the lives of Campbell and Walker and then spoke of Judge Cooley and his services as dean of the first faculty and called on him for reply.

Judge Cooley replied as follows:

Hereafter I shall feel more at home in this hall than I have felt now for many years, for I shall see upon the walls the likenesses of two gentlemen with whom for many years I was here most closely and pleasantly associated, and it will almost seem like a family gathering after long separation. It is now thirty-four years since the law department of the university was organized by the board of regents, in the appointment to the three chairs of instruction then established of Judge James V. Campbell, Mr. Charles I Walker and myself. I was the youngest of the three, and less known than either of the others in the profession. I came here naturally looking up to both of them as my leaders and my superiors. Mr. Walker and myself had seldom met. With Judge Campbell I was better acquainted; but we were suddenly brought into a new relation, and so far as I know, without any previous consultation by the regents with any of us. Certainly neither of us had sought the place. Meeting here to look the ground over and arrange the work between us, we did so with so little of formality and with such entire and hearty concurrence of views that there is almost nothing that I can specifically call to mind now as being of special interest. Judge Campbell was rather informally than otherwise recognized as our natural and proper dean; the appointment of subjects was made exclusively with reference to what we thought was best for the school, and with but a single expression of personal choice on the part of any one, and that was by Judge Campbell that he should not have assigned to him the subject of constitutional law. This surprised Mr. Walker and myself not a little, because we had naturally expected him to prefer that, and we certainly had looked upon him as eminently fitted to do it justice. The reason assigned for this was also something of a surprise: If he should take that branch of the law his inclination would be to greater freedom of discussion and of expression of individual opinion than would perhaps be desirable in giving class instruction. Those who knew him will agree with me that while it was proper to respect his wishes, any scruples on the ground stated were quite useless, for so competent a man could not discuss the subject too freely.

From the time the law school was opened, so long as we three were associated together in instruction, there was never an occasion when differences of opinion arose as to teaching, as to methods, as to what we should ask of the regents, or as to anything in respect to our duties to the university, which created the least friction among us, or was the occasion of

the slightest unpleasant feeling. I think it but proper that I emphasize this fact here and now, because a time soon came when, as resident professor, the responsibility in management fell most largely to me, and the credit of what I state is due chiefly to the others, who could and did advise and guide without unpleasant criticism or censure. There never was a controversy with which we had occasion to go to the regents. There never was an opportunity for outside gossip concerning the interior management of our school. There never was friction between the faculty and the president of the university, or anything but the most pleasing and agreeable relations. And this was by no means because the three men thus thrown together were men wanting in positive qualities, or inclined to defer to what they thought unreasonable in order to win favor or meet the views of others. Judge Campbell especially was a man of decided convictions and of very positive characteristics; firm always, and inclined to yield to others only when he saw convincing reasons therefor. And Mr. Walker would hardly be thought wanting in any of these particulars. The discussions in our faculty meetings were often very earnest, but were seldom carried beyond a single session, and I recall no one instance now in which I can say with any confidence that I believe any member of the faculty thought or even suspected that one of his associates was unreasonably persistent or selfish in adhering to a view he had expressed upon any question that arose before us. There was thus no occasion for even temporary annoyance as the result of one of our meetings, much less for any ill-feeling; and I look back upon it now as one of the most gratifying things I can say in regard to my public life, that I was for so many years associated with two of the most able and notable gentlemen of the state, in personal relations that could not possibly have been improved, and that during all the time too, our relations with instructors in other departments and with the governing authorities of the university were of the most satisfactory character. I can say the same in like emphatic terms of our relations with the large classes who year by year came to us for instruction.

With great satisfaction therefore I come here now to see these portraits go upon the walls. They will be commemorative at once of faithful work and of the noble characteristics of two of Michigan's most distinguished men. For personal reasons I most heartily return to the alumni of the law department my thanks that the portrait of one of the first law faculty, which was here before, is no longer to be left in its somewhat frigid loneliness. These should have been here first; but they are here now; and as I enter this hall hereafter I shall take some degree of pride as I look upon them in calling to mind how long I was associated with those they represent, and to what extent I can say that these were not merely my brothers in the faculty, but to a considerable extent my teachers also.

Dean Knowlton then called upon President Angell, facetiously introducing him as "one of two great men," who entered the university in 1871. Mr. Angell entered as "simply the president" of the university, while he (Prof. Knowlton) the then "other great man" entered as a sophomore. The president remarked, by way of introduction to an interesting address, that "it would take too long to describe the amount of respect with which the sophomore class of '71 inspired him." He then spoke as follows:

I am here to testify by my presence rather than by words, my deep interest in this occasion. Since Mr. Justice Grant, who was a pupil of

Judge Campbell and Judge Walker, and Judge Cooley who was so long a colleague of both in the law faculty and besides for many years a colleague of Judge Campbell on the supreme bench of Michigan, have spoken in so felicitous a manner, remarks of mine may be deemed superfluous. But as I am called on by the dean, my affection and my esteem for Judge Walker and Judge Campbell prompt me to say something of their personal qualities.

Judge Walker, although he was not lacking in impulse and courage, has always impressed me as a man of amiable and pacific spirit. He was a composer of dissensions, not a breeder of them. He has a clear and methodical mind. Its operations are orderly and direct. He has a simple and compact style of expression. These mental qualities made him an admirable lecturer. He marked out sharply the territory he was to cover in his instructions. He made his points sharply and incisively. His hearers were able to carry away from each lecture a distinct addition to their stock of legal learning.

He is a man of large attainments in one field outside of his profession. There are few men in the country, I think, so well read as he in the early history of these northwestern states. He collected a very large amount of original material on that subject and intended to write a work upon it. It is much to be regretted that he has felt constrained to abandon his project. He is a man of earnest religious convictions, and his counsels are much prized in the community with which he is connected. He has had heavy trials, but has borne them with a serenity and patience which have commanded the profound respect of his acquaintances. I am sure we all join in the hope that the evening sun which is now falling upon him, will shine with undimmed splendor to the end of his day.

Judge Campbell was a man whose face would at once attract and hold your attention, even if you should see him for the first time in a throng. He was in the noblest sense of the term a singularly handsome man. He had a face radiant and luminous, and an eye of extraordinary beauty. He had what one may call an academic bearing, as indeed his mind always impressed me as academic in its very fibre. It used to seem to me that he ought to have been purely and simply a university professor. He was fond of books, fond of study, fond of students, fond of lecturing. He evinced such enthusiasm in respect to letters, if the conversation turned on that subject, that I used to wonder how he could have given attention to the dry details of law. But turn the talk to some question of law, and he was equally fertile and enthusiastic, especially if the history or import of the great system of British law were under consideration.

He was a man of unusual attainments in other subjects than the law. He was well read in French literature. I doubt if we have more than two or three scholars in the country who were more familiar than he with the whole history of the French domination in Canada, in this region, and in the Mississippi valley. He had read largely on that theme. He had explored archives in Canada. He had preserved many of the oral traditions which had been handed down among the French in this neighborhood. He was also especially familiar with the early history of Detroit, and with the early history of this university. He knew personally and intimately most of the founders of the university. He had been connected with the institution a large part of his life. At his death I think only one man was living who was connected officially with the university earlier than he. In 1845 he was made secretary of the board of regents.

He was a remarkable conversationalist. Often has he honored me by

coming to my house at seven o'clock in the evening, and has talked straight on almost without a break till eleven, and we were sorry to have him stop then. He gave such vivid portrayals of the old French settlers, of the French governors, of the founders of the university, that they all seemed to be living again in our presence, and the light of a lambent humor played over his whole narration. Like Judge Walker he too was a man of deep religious life, was for years one of the standing committee in the Episcopal diocese of Michigan, and was much consulted in regard to religious and ecclesiastical affairs.

In behalf of all the faculties and of the authorities of the university I can return most hearty thanks to the law alumni, who have placed these pictures upon our walls. Thousands of loving hearts of lawyers in all parts of this land turn fondly back to this room with its hallowed associations and memories. It will be dearer than ever now that it will hold forever the portraits of their revered teachers. Dearer too will it be to you and to those who come after you, because from the faces of these noble men you and they can draw inspiration for worthy and honorable careers.

Prof. Griffin, as the oldest member of the present faculty, was next called upon. He received an ovation, and responded as follows:

I am most happy to be present on this occasion. I had the honor and pleasure some years ago, during the lifetime of Judge Campbell, in behalf of the bar of the state, to present his portrait to the supreme court. The proceedings are reported in the 63d Mich. It was my good fortune to be a member of the first class examined by the then newly organized supreme court, of which he was so important a part.

I shall never forget the form of the young judge, as he descended from the bench and extended his hand with words of encouragement and promise for the future. His features were of classic mould, and his face evinced the repose of dignity, the refinement of culture, and a touch of sympathy and interest in the new strugglers after professional honors. Ever after that I knew him as an older friend, and practiced before him for more than a quarter of a century in the high place which he then occupied.

On my entrance to the bar I found at the top of the profession the distinguished counsellor whose excellently painted portrait has also been delivered as a gift to this department. His venerable age and somewhat infirmity admonish us that he must soon follow his companion in letters and in the law. His name is enrolled in the foremost rank of the most honored names of the profession of this state.

Delicacy forbids that I should allude at any length to the jurist personally present with us whose reputation is not confined by state boundaries but is national and world-wide. Thus, young gentlemen, you have before you the personal presence of one, and a representation of two—the famous trio who organized, fostered, and substantially brought into the strength and vigor of manhood the law department of this university. Whatever of credit and of honor may possibly belong to those who have come after, it may truthfully be said that they have had no peers upon this platform.

This closed the ceremonies of the morning, and the gentlemen retired from the platform, with the exception of the last speaker who remained to deliver the usual morning lecture to the seniors.

But few lectures delivered on the campus this year were of more interest than the one delivered by Dr. Vaughan, dean of the medical de-

partment, in the law lecture room, Tuesday evening, May 9, in which he reviewed some notable murder trials from the standpoint of a medical expert.

The lecture was delivered in response to an invitation extended by the senior law class. The doctor directed his attention in the main to three famous murder cases where death was supposed to be caused by poison, the Hall case (48 Mich., 482), Millard case (53 Mich., 63) and the recent Buchanan case (N. Y.). The expert testimony adduced at these trials exploded several fallacious theories. In the Hall case there was the question of the distribution of arsenic throughout the system when death is caused by that drug, and it was demonstrated beyond a doubt that when arsenic is introduced into a living body strong enough to produce death, traces of it will be found in the brain, spinal chord and all the tissues of the body.

The defense in the Millard case undertook to account for the arsenic found in the body of the deceased by showing that a cup-full of a solution of arsenic had been introduced into the body after death. This raised the question whether or not arsenic would diffuse through the tissues after death. Dr. Vaughan by a great number of experiments after Millard's first trial found that a solution of arsenic introduced into a dead body with an ordinary syringe, as the defense claimed had been done, would enter all parts of the body. Prior to the experiments of Dr. Vaughan in reference to this case, the books all contended that poison, to reach the kidneys and liver must be administered before death. The doctor's important discovery was the means of acquitting Millard on the second trial.

The Buchanan trial worked a more important result. The doctor proved, that heretofore toxicologists have in tests, confounded the chemical reaction of certain substances found in the body during putrefaction with that of morphine and some other poisons which, in the usual tests employed give exactly the same reaction. At the trial, by six tests, he showed that pancreatic extract containing morphine, gave a reaction identical with some that did not contain a particle of that drug, thereby confounding a number of learned chemists. This fact will have a tendency to make medical and toxicological experts more guarded in their testimony and less positive when there is room for doubt. It has been the doctor's experience that such a tendency is desirable for he has heard medical men of high standing swear positively that persons have died from morphine poisoning, when the symptoms described were exactly similar in every detail to those accompanying certain diseases. The doctor's testimony did not go to show that Mrs. Buchanan did not die of morphine poisoning, but proved that the experiments made were not conclusive that she did, as was claimed by the experts for the people. He said that when a person is charged with the commission of a crime and an autopsy is held it should not be made solely by those interested in conviction. It should be made in the presence of experts for the defense as well, and under the supervision of an expert appointed by the court.

The '93 laws will have the never-ending gratitude of all laws who follow them, if they carry out their idea of putting a memorial "drinking fountain" in front of the law building. A committee of the class waited on Dean Knowlton, to get his views concerning the matter, and he ex-

pressed himself as being much pleased with the idea, and stated that the faculty would quite willingly look after all water rates if the fountain was put in.

The second debating contest between the Webster and Jeffersonian societies took place on Wednesday evening, the 10th. The subject was: Resolved, "That all quasi-public corporations should be owned and controlled by the government." E. A. Fink and P. M. Troy took the affirmative for the Webster society, and were beaten by C. Thaxton and W. C. Belknap, of the Jeffersonians.

Hon. David Mills, an alumnus of the law class of '67, has been tendered an invitation by the Canada Club, a new U. of M. organization, to deliver an address before them on May 24. Mr. Mills resides in London, Canada, and is one of the most prominent members of the Dominion parliament.

The board of managers of the U. of M. Daily are contemplating the publishing of an alumni weekly next year, and will, provided the prospects for its success are as favorable as they are now.

W. H. Evans, law, '93, contemplates issuing a small sheet at Columbus, O., having for its main object the distribution of news regarding the whereabouts and doings of the '93 alumni.

A few '94 laws talk of founding a class annual, devoted to class interests, fun, etc. It will differ from other college publications in that it will not contain any advertisements.

R. Campbell, law, '93, will be the junior partner in the firm of Parkinson & Campbell, Jackson. The firm was formerly known as Parkinson & Day.

A stock company is in process of formation, having for its object the floating of a new literary venture, in the form of a fortnightly comic paper.

J. C. Travis, '94 law, was elected secretary of the National Republican College League which met in Louisville, Ky., the second week in May.

E. F. Johnston law, and of the class of '92, has issued a book of poems. The first edition is nearly sold.

THE JURY SYSTEM.

To the Editors of the Michigan Law Journal:—Permit me a few words upon the much discussed subject of jury trials. I do not agree with the sweeping assertions that we often hear now-a-days such as the following: "That trial by jury is the greatest farce of modern times;" "that it is an infinite evil in civil cases;" "that in criminal cases it is a positive curse to society;" "that trial by jury is simply a trial by popular prejudice."

Such remarks may truthfully apply to trials in great cities about which I know very little, but I do not believe that they are true of trials in smaller communities. My experience is limited to three or four counties in this state and must go for what it is worth, but I think these counties are fairly representative of the state at large outside of Detroit and Grand Rapids. They are in the main agricultural counties but contain one city of at least thirty thousand inhabitants known as a lumber town, two towns of about ten thousand inhabitants, and a number of villages of varying size. The population is of the common American type and shows the natives to be of mixed descent, in this instance largely German, "Scotch-Irish," and a noticeable but not unusual proportion of foreign born citizens in the larger town I have mentioned. There is no remarkable or accepted standard of culture, either moral or intellectual, but the intelligence and uprightness of the people are simply such as may be found wherever churches and schools are recognized as essential factors in private and public life.

The juries drawn from this people comprise individuals of all classes. In fifteen years' observation of the courts in these counties, I can truthfully say that an unjust verdict—by which I mean a verdict against the decided weight of the evidence or against the law of the case as declared by the court—has been the exception. Such verdicts have certainly been rendered, and the moving force was no doubt sometimes popular, or more frequently local and individual, prejudice; but the ordinary dispute, civil or criminal, has been almost always decided correctly and to the satisfaction of the community. Assuming my assertion to be true, certainly no more could be said of trial by judge, the only substitute seriously proposed for trial by jury.

There are to my mind, however, great objections to trial by judge. None of them are new but they are so important that in my judgment they ought to be repeated again and again. 1st. It would take away the political value of trial by jury. I do not allude of course to trials growing out of the quarrels of partisan politics, for they are not numerous and may be put aside; or even to the vitally important struggles for the liberty of the person and of the press, which it might be necessary to renew if the decided obstacle of trial by jury, viz: by those immediately and earnestly interested in the preservation of these liberties, was removed out of the road of government, and thus the temptations of power had one less check; but I allude particularly to the value of jury service in the political

education of the ordinary citizen, and its importance in bringing home to him his relation to the organized community and to the administration of justice. This consideration could be much elaborated, and I think with profit, but I only want here to repeat the simple thought.

2d. Trial by judge would greatly endanger public confidence in the courts. I believe it to be much more important that the community should believe cases to be rightly decided, than that a right decision should in fact be made. The reasons for decisions are often artificial, often complicated, often expressed in technical words, seldom fully understood even by ordinarily intelligent men, and the community, recognizing these facts, cares little for anything but the decision. This rests finally for acceptance upon the position of the judge in the opinion of the people, and I ask you to consider how long that position would remain unshaken if he were constantly obliged to declare that he could not believe the oaths of continually increasing numbers of his acquaintance, neighbors and fellow-citizens. There is a statute in this state permitting the parties to waive trial by jury, and I remember the dismay of a judge called to try a case under this law, when, as he told me he found himself in the thick of a bitter family quarrel among his personal friends, and obliged to say in effect—for the testimony compelled that conclusion—which set of witnesses had sworn to a lie. Multiply such an instance by many, or only by several cases each year—and no year is free from them—add the ramifications of blood, marriage and friendship, and consider how long it would be before these scattered centers of disaffection and bitterness would affect in some degree the whole community.

The impersonal jury declares its disbelief in an oath and melts away, to be forgotten in most cases, or if occasionally followed by individual rancor, at all events to transfer the quarrel to private life; but the judge is personal, permanent, and too conspicuous to be forgotten, and being also the representative of public justice, to lose confidence in him for any reason, although unworthy and inadequate, is to lose respect for the law he declares, and from which in practice he cannot be separated.

3d. Trial by judge would not satisfy the unsuccessful suitor, as does trial by persons of his own way of life and habits of thought. I am now of course speaking generally and of ordinary disputes, and thus qualified I believe the assertion to be true. In many cases, perhaps in most, the leading facts are not seriously in dispute, but the controversy is about the proper inferences to be drawn therefrom. One element in the problem, and one of the greatest importance, is to find the point of view of either party. Take, for instance, a verbal contract of hiring between a farmer and a laborer. The words are substantially the same in the testimony of both, but they differ considerably as to the meaning. Who is better fitted to decide that difference, and whom would the community regard as better fitted,—the judge, or an average jury? I do not see how a judge, living of necessity a separate life, properly shut out from much of affairs and of active business, restricted in his intercourse with other men, can possibly be as competent to decide such questions of fact as I have merely indicated, as those who live so to speak in the atmosphere of the facts and who know fairly well what and how much is not expressed in many contracts, and yet is most truly a part of each. There are other considerations which deserve place in a fuller discussion of the subject, but I will not trespass further upon your courtesy. I have only to add, that if sober, intelligent and judicious persons, were in all cases selected to serve, it

would, I think very soon appear that the attacks upon this method of trial have been misdirected and ought rather to have sought out for vigorous and persistent assaunt the carelessness, the partisanship, the ignorance and, no doubt, sometimes the corruption which have too often determined and still do determine what citizens shall share its honors and perform its duties.

JEROME E. TURNER.

Muskegon, Mich.

THESES OF THE LAW CLASS OF '93.

Following is a list of the theses handed in by the '93 Laws, with the names of the writers:

- Aggles, W. T., Stoppage in Transitu.
 Akers, Eva J., Libel.
 Albers, G. H., Law of Blockades.
 Albertson, U. S., Right of Argument.
 Axford, L. L., Testamentary Capacity.
 Baker, L. L., The Police Power of the State.
 Baldwin, F. E., False Pretense.
 Barney, F. R., Consideration of Contracts.
 Barnhart, Marvin E., Acts and Proceedings by and against Municipal Corporations.
 Barras, A. C., Domicile.
 Bates, L. H., Attorneys at Law.
 Beal, Fred W., Admissions.
 Beale, Ross, The Doctrine of Estoppel.
 Bean, E. J., The Decrease of the Republican Vote in Ohio and Legal Relations attendant.
 Bennett, E. Paul, The Anglo-American Jury System.
 Beute, H. K., Real Estate Mortgages (as Applicable to Missouri Law.)
 Bickley, U. F., Title by Occupation.
 Bierd, W. J., Duties and Rights of Parents.
 Bither, E. J., Injunctions Concerning Real Property.
 Blakey, C. B., Hearsay Evidence.
 Blessing, A. N., Bill of Lading.
 Bodwell, Edward Joseph, Simple Larceny.
 Bordeaux, James A., Tort in Publication, or Law of Libel.
 Bradley, Nick M., Arson.
 Brittain, Jos. C., Contributory Negligence, Railroad Corporations Defendants.
 Brooks, W. M., Law of Liens.
 Brough, B. F., Foreclosure of Mortgage.
 Brous, A. H., Code Pleading.
 Bruce Otto J., Indiana Ditch Law.
 Buchanan, F. R., Execution and Revocation of Wills.
 Bumphrey, E. M., Signatures of Negotiable Instruments.
 Calkins, H. V., The Res Gestæ.

- Campbell, F. Grove, Growth and Leading Features of the Action of Assumpsit.
- Campbell, G. R., Power of Attorney.
- Campbell, Robert, Replevin.
- Campbell, R. L., Right of Dower.
- Carson, Oliver H., The Doctrine of Proximate Cause as it relates to the Negligence of Highway Officers and Commissioners in not keeping Highways in a reasonably safe Condition.
- Chandler, E. E., Conveyance of Real Estate under the Missouri Statutes and Decisions.
- Clough, T. M., The Development of the Rights of Married Women.
- Conroy, W. J., Promissory Note.
- Cooper, R. M., Contingent Remainders.
- Crosby, J. J., Riparian Rights.
- Danhof, James J., Contracts Ultra Vires.
- Davis, M. Levant, Privileged Communications in Libel and Slander.
- Dedrick, Chas. E., Incompetent Witnesses in Criminal Cases.
- Dedrick, H. T., Stoppage in Transitu.
- Dentler, G. A., Writ of Error.
- Diol, Chas. M., Replevin.
- Dougherty, H. F., Marriage.
- Duncan, J. J., Rights and Interests of Parties to Mortgage.
- Eckert, George E. S., High Court of Chancery.
- Evans, W. H., Law of Newspaper Libel.
- Falknor, A. J., Legal Rights and Duties of Teachers, Parents and Pupils in our Public Schools. I.
- Ferguson, G. E., Invalid Wills.
- Fields, Geo. M., Mandamus.
- Fields, W. H., Husband and Wife.
- Fink, E. A., The Onus Probandi or Burden of Proof.
- Fitzer, Willard C., Legal Proceedings by and against a Private Corporation.
- Fleming, Porter W., Contracts of Infants.
- Friedman, Chas. K., Legal Rights and Duties of Teachers, Parents and Pupils in our Public Schools. II.
- Gardner, Henry M., Execution of Wills under Statute of Michigan.
- Gibson, Andrew E., Surface Water.
- Good, Jas. W., Declarations relating to all parts of the Res Gestæ.
- Griffen, F. J., Discharge of Contract by Impossibility of Performance.
- Groumger, F. C., Real Evidence.
- Grover, D. C., Pleading, with Specific Observations on the Code System.
- Hadley, J. C., Drainage in Iowa.
- Hall, E. M., Title of Public Grant.
- Hall, W. R., Contract of Guaranty and Suretyship.
- Harrison, G. N., Assignment of Shares in Action at Common Law.
- Hatch, Metcalf B., The Equity of Redemption.
- Hegner, H. L., Revocation of Wills.
- Henton, J. S., Liability of Corporation for the Torts of its Agents, Officers, Employees, etc.
- Hindman, A. C., Burden of Proof.
- Hollingshead, E., Construction of Article VII, Section V of the Constitution of Michigan.
- Howell, C. M., Effect of False Representations in Sale of Chattels.

- Hoy, J. B., Law of Self-defense.
Humphrey, H. H., *Res Gestæ*.
Hunter, J. S., Exceptions to the Rules Excluding Hearsay.
James, John H., Proceeding by Attachment in the State of Ohio.
Jarrett, H. M., Monomania.
Jarvis, H. W., Expert Testimony.
Jefferson, Louis W., Irrigation Law in California.
Jones, Frank G., Form and Technique in Law.
Jones L. C., Eminent Domain.
John, Thomas, Origin and Title to Real Property.
Johnson, Edwin L., Winding up a Contract by Legal Proceedings.
Johntz, J. E., Discharge of Contracts.
Keiser, A. A., Errors made by Witness on the Law of Gratuitous Bailment.
King, Samuel A., Expert Testimony as applicable to Law, Medicine and Surgery.
Kisler, Geo. S., Habeas Corpus.
Kleekamp, F. H., Provision for the Enforcement of Liens.
Knecht, O. G., The Writ of Habeas Corpus.
Koenig, John H., Principal and Surety.
Kuiper, G., The Railroad as a Public Highway and its Exercise of the Right of Eminent Domain.
Laune, J. B., Retrospective Laws.
Lester, B. F., Protection to Accused Persons during Trial.
Lillie, H. C., Frauds and Torts of Minors.
Linthicune, J. R., Sureties.
Lipson, Isaac B., Mistake.
Lockhart, J. M., The Law relating to the Vein or Lode in Quartz Mining.
Lovett, H. T., Garnishment; Who may be Garnished.
Marland, E. W., Roman Wills.
Martin, E. P., Parol Evidence to Vary a Written Agreement.
Miller, Will L., *Non Capax Doli*.
Morey, W. S., Eminent Domain Limited to what Constitutes a Taking.
Morrell, Norman B., Writ of Habeas Corpus.
Morrow, W. O., Wills.
Mullen, W. E., Gaming Contracts.
Murdoch, John W., Declarations Part of the *Res Gestæ*.
McCaughey, J. W., Mexican Grants as a Source of Title to Lands in California.
McCullough, H. B., The *Res Gestæ* in Evidence.
McEnerny, M. C., Admissibility of Oral Evidence to Affect that which is Written.
McIntosh, Jas. L., Injunctions in Restraint of Private Nuisance.
McMahon, S. E., Liability of Municipal Corporations for Injuries Resulting from Defective Sidewalks.
McNay, C. D., Law of Exemplary Damages.
McReynolds, Wm. E., Moral Insanity.
McRoberts, Sam, The Dartmouth College Case.
Nattinger, Geo., *Terra ex Aqua*.
Nelson, James B., The Rights of Creditors against Private Corporation.
Newton, R. Voorhees, Privileged or Confidential Communications.
Noble, F. A. Jr., The Test of Criminal Responsibility.
Norton, W. D., Doctrine of *Ultra Vires*.

- Nowlin, Stephen A., Consideration in Contracts.
 Osborn, M. H., The Jury System.
 Otto, Geo. C., Habeas Corpus.
 Paddock, Lewis H., History of the Writ of Habeas Corpus in England and the United States.
 Palda, L. J. Jr., Extrinsic Evidence.
 Palmer, Jonathan Jr., Liability of Telegraph Companies in Cases of Error and Delay in the Sending of Messages.
 Park, John G., Warranties and Representations in Life Insurance.
 Parker, George J., A Personal Action Dies with the Person.
 Parsons, Chas. F., Declarations forming Part of the Res Gestæ.
 Partridge, F. P., Stare Decisis et etiam Rebus Circumstantibus.
 Patrick, James E., Ultra Vires.
 Paul, Marion G., False Imprisonment.
 Percy, John A. Jr., The Laws of Spain and Mexico as a Source of Title to Land in California.
 Phillips, J. S., Recording, Filing and Refiling of Chattel Mortgages.
 Porter, Claude H., Attachment in Iowa.
 Powers, H., Wills or Titles by Devise.
 Prentis, George G., Agency.
 Reed, E. T., Estoppel.
 Reed, Herbert H., Liability of Infants on Contracts.
 Reeves, W. A., Real Estate Mortgages.
 Richardson, C. P., On the Avoidance of Contracts Made by Infants.
 Rideout, D. O. Jr., Declaration and Admissions in Evidence.
 Riggs, F. J., Attachment.
 Rings, Geo., Contributory Negligence.
 Roehrig, Chas. F., Defence of Contributory Negligence.
 Rooney, John Aloise, Can a Murderer Reap the Benefits of his own Crime?
 Rosenberry, M. B., Practice in the Formation of Private Corporations.
 Rowe, Percy, Res Gestæ.
 Ruch, H. Thos., Chattel Mortgages in the State of Indiana.
 Rudin, Fritz, Boycotting.
 Sands, Mark A., Declarations relating to or a Part of the Res Gestæ.
 Scanlon, B. F., Just Compensation under the Right of Eminent Domain.
 Schoonover, Eugene G., Liability of Trustees for Interest on Trust Funds.
 Scott, Geo. G., Habeas Corpus, History of and Proceedings under It.
 Scrutchin, O. W., Libel.
 Servatius, J. H., Demurrer.
 Sessinghaus, Oscar F., Doctrine of Stare Decisis.
 Shamel, Charles H., Some Questions connected with Criminal Parsimony.
 Sheehan, J. W., Doctrine of Imputibility or Negligence in Torts suffered by Infants.
 Shipp, R. A., Master's Liability to the Servant for Negligence.
 Slick, Thomas W., Insanity as an Excuse for an Imputed Crime.
 Smelser, W. M., Rules of Pleading.
 Smith, Frank C., The Pardoning Power.
 Smith, Hinckley, Voluntary Associations.
 Snearly, Elmer, Examination of Witnesses.
 Somerville, Reuel, Title by Descent.
 Stanfield, W. S., Dower, How Barred.

- Stewart, George C., Suicide as breach of Life Insurance Policy.
Stricler, S. L., Res Gestæ in Evidence.
Swan, Wm. C., Duties and Liabilities of Steamship Companies as Common Carriers.
Sykes, U. S., Settlement of Estates.
Thaxton, Clifford, Dealings in Futures.
Thompson, Arthur G., Declarations Relating to the Res Gestæ.
Thompson, Geo. W., The Complaint under the Code.
Thorington, C. C., Pleadings and Proofs in Accident Cases.
Thornton, Howard A., Attachment.
Tracy, Will L., Contracts of Infants.
Trevor, F., Insanity as a Defense for Crime.
Trimble, Chas. O., Trial Practice.
Troy, P. M., Pleading the Statute of Frauds.
True, George A., Privileged Communications.
Tucker, A. B., Parties to Actions at Common Law.
Tunison, H. O., Indorsement of a Promissory Note.
Tupper, G. W., Stoppage of Goods in Transitu.
Tweddle, J. J., Ex Post Facto Laws.
Upton, A. H., Samuel J. Tilden's Will.
Van Horn, O. B., Dower, How Barred.
Van Sellar, Harry H., Municipal Corporations,
Van Tassel, J. H., The Rights of the Minority in a Corporation.
Vickery, B. E., Stoppage in Transitu.
Vickery, Earl J., Injunctions against Public Officers.
Voorhees, Campbell M., Character in Evidence.
Voorhies, W. B., Rights of Married Women to Contract.
Waddle, R. T., Starting Fires.
Walsh, C. C., The Act of God.
Walter, Fred W., Contracts in Restraint of Trade.
Walters, C. E., Obedience to Civil Law, a Moral Obligation.
Webb, W. T., On the United States Constitution.
Weil, Edwin F., Writ of Mandamus.
Wiggins, S. T., Unequal and Partial Legislation.
Wilcox, Edwin A., The Liability of Municipal Corporations for Keeping Highways in Repair.
Wilson, W. G., Dower.
Wright, V. A., Felonious Homicide.
Yancey, T. L., Law of Eminent Domain.

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PROCEEDINGS OF THE FOURTH ANNUAL MEETING OF THE MICHIGAN STATE BAR ASSOCIATION.

The fourth annual meeting of the Michigan State Bar Association convened at 2:15 o'clock p. m., in the senate chamber of the capitol, Lansing, on Tuesday, June 6, President Edward Cahill in the chair, Ralph Stone, secretary. The minutes of the third annual meeting and of the special meeting held at Lansing on January 17, 1893, were approved. The president's annual address was read by the president, Edward Cahill, of Lansing.

On motion, John C. Patterson, of Marshall, Andrew Howell, of Detroit, and S. L. Kilbourne, of Lansing, were appointed a committee on the nomination of new members. Ralph Stone, secretary, read his annual report, combining with it his paper upon "The Mission of the State Bar Association." The treasurer's report was submitted by the treasurer, Edmund D. Barry, of Grand Rapids, and referred to the board of directors to be audited. It showed a balance of \$162.47. The report of the board of directors was read by W. H. H. Russell, of Detroit, in the absence of the chairman, Levi T. Griffin. The report detailed the arrangements that had been made for the annual meeting, recommended changes in the constitution, which however were rendered unnecessary by the adoption of a new constitution later in the proceedings. The board deemed it unnecessary to make any further suggestions as to the relief of the supreme court in view of the action the legislature had taken. The report concluded as follows:

The board of directors also urge upon the association the importance of appointing a committee to urge upon the bar of the state the necessity of maintaining the "Michigan Law Journal." No such opportunity has heretofore been presented to the bar of the state of keeping up an organ of communication. The "Michigan Law Journal" is worthy of the patronage of the entire bar. It has always contained matters of interest, and original articles worthy of perusal and commendation. At a recent meeting of the bar association of Detroit, a committee was appointed to procure additional subscriptions to the journal; but this committee, of course, could only act locally, and by their efforts a very large additional subscription has been secured among the members of the bar of Detroit.

The journal should, in some way, receive the express sanction of the state bar association and the benefit of its exertions in its behalf, by such method as the association shall deem wise."

REPORT OF COMMITTEE ON LEGAL EDUCATION AND ADMISSION

TO THE BAR.

The committee on Legal Education and Admission to the Bar, through its chairman, Alexander R. Avery, of Port Huron, submitted the following report, prepared by Prof. Floyd R. Mecham, of Ann Arbor:

Your committee on "Legal Education and Admission to the Bar" beg leave to submit the following report:

Since the last annual meeting of this association no legislation has been had upon the subject. A bill was introduced at the recent session of the legislature but did not pass either house. It is understood to have been substantially the very excellent bill prepared by Professor Levi T. Griffin, as former chairman of this committee, which had also failed of passage two years ago.

Your committee believe that legislation upon the subject is needed. The present system, or more properly lack of system, in conducting examinations for admission to the bar is so palpably defective and unequal in its operation as to cast reproach upon the profession and the people. Your committee believe that the true place to teach law is at the law school, and they believe the time is coming, if it has not already arrived, when, like medicine, dentistry and pharmaceuticals, the interests of the public and the profession will demand that it be taught only in the law school. If, however, the system of private study in the law office is to be continued, your committee believe that the whole matter of examination of applicants should be vested in a single state board of examiners.

Your committee recommend that legislation be sought to cover substantially the following objects:

1. The appointment by the governor of a board of law examiners, to consist of say five reputable members of the bar, so appointed and classified that one shall go out of office each year.

2. That the board shall hold regular public examinations at such convenient times and places, in different parts of the state as they may prescribe, and that all examinations for admission to the bar be conducted by said board.

3. That no applicant for admission (except as hereafter stated) be permitted to take the examination unless he is a citizen of the United States and a resident of this state and has arrived at the age of twenty-one years and satisfied the board that he is of good moral character and has actually pursued the study of the law for a period of at least two years, one of which shall have been spent in the office of some reputable member of the bar of this state, or in some reputable law school.

4. That the examination be conducted chiefly in writing and be so thorough as to afford reasonable assurance that the person passing it has such general intelligence and knowledge of the law and its practice as to enable him to assume and discharge the responsible duties of the lawyer.

5. That upon passing such examination, a certificate thereof be given which shall entitle the person to be admitted, upon motion, to the bar of the supreme court or any circuit court of the state upon taking the oath of office and paying the customary fees.

6. That no person failing to pass the examination should be permitted to renew his application within six months.

7. That graduates of the Law Department of the University of Michigan or of any other respectable law school in this state, maintaining not less than a two years' course, be entitled to admission to the bar of the supreme court or any circuit court, upon the production of their diplomas and filing the customary petition without taking the examination above provided for.

8. That each member of said board shall receive a fair per diem for the time actually employed, and be reimbursed for his actual expenses; both to be paid by the state. That each applicant for examination be required to pay to the state a small fee, say two dollars, at the time of applying for examination. That the members of the board be authorized to elect their own officers, make needful regulations and incur such expense for room, printing, etc., as may be necessary. A majority of the board to constitute a quorum and be authorized to perform all the duties of the board.

9. That members of the bar of other states may be admitted to practice in a single case in any court upon motion to the court in which such case is pending; but that in other cases a member of the bar of another state shall not be admitted to the bar of this state without taking the examination above provided for, unless he produces satisfactory evidence that he has for at least three years been a member of the bar of the highest court of his state, and that his private character is good.

Your committee further recommend that the proper committee be instructed to draft a bill including the above provisions, or such others as the association may favor, and that it be reported to the next annual meeting of this association.

The report of the special committee on nomination of new members was submitted, adopted, and the applicants declared elected to membership. Those elected are: Alpheus Felch and Charles H. Kline, Ann Arbor; E. L. Walbridge, Grand Rapids; J. P. Lee, F. S. Porter, Henry Whiteley, James Harris, Charles F. Hammond and Q. A. Smith, Lansing; A. E. Miller, Marquette; Aug. C. Baldwin, Pontiac; W. L. Jenks, Cyrus A. Hovey, Lincoln Avery and Joseph Walsh, Port Huron; George W. Davis and John A. Edget, Saginaw; Barton T. Jones and Cassius Alexander, Grand Ledge; Fred H. Aldrich, Cadillac; Charles E. Miller, Ironwood; Charles M. Howell, Bessemer; E. E. Smith, Otsego; Fred B. Wood, John E. Bird, Wallace Westerman, J. C. Winne, Walter W. Westerman and Richard A. Watts, Adrian; F. A. Lyon, Hillsdale; Clement Smith Hastings; William P. Evans, Pentwater; Kelley S. Searles; Ithaca; William B. Williams and Charles R. Wilkes, Allegan; Henry H. Woodruff, Roscommon; Charles A. Sturgis, Sturgis; William K. Clute and George E. Nichols, Ionia; William H. Porter, Marshall; A. M. Cummings, Mason; Lawton T. Heamans, Hastings; William A. Balke, Alma; James Wheaton, Leslie; William S. Cobb, Charles H. Smith and William E. Ware, Jackson; E. W. Lewis, Williamston.

**REPORT OF COMMITTEE TO PREPARE BILL FOR RELIEF OF
SUPREME COURT.**

The report of the committee appointed by the special meeting of January 17, 1893, to prepare a bill to relieve the supreme court by the addition of five justices, and introduce it in the legislature, was submitted by George P. Wanty, of Grand Rapids, the committee being composed of Edward Cahill, George P. Wanty and Levi L. Barbour. The report is as follows:

This committee immediately after the January meeting prepared a bill in accordance with the instructions of this association, and had the same introduced in both houses of the legislature. After several meetings of the joint judiciary committees of the house and senate, it became apparent that the number of additional judges should be reduced to two, and your committee were assured that such a bill, if passed, would meet the approval of the executive. The bill was thus changed and reported out of the judiciary committee of the senate favorably, and your committee were given to understand that the bill in that form had enough votes pledged to secure its passage by the legislature.

Almost immediately after the bill had been introduced in the legislature different members of that body came to members of the committee with the intelligence that the bill did not meet the approval of the members of the supreme court. The objections that these members of the legislature intimated had been made by members of the supreme court were easily explained, and notwithstanding such rumors your committee had no doubt of the passage of the bill until within a few days before the legislature adjourned, when members of the committee were approached by members of the bar with a petition to be presented to the legislature for an entirely different method of relief than had been even suggested at the meeting of the bar association in January.

The proposed method in this petition was for an increase of salary with the provision that the members of the court should reside at Lansing. This being entirely foreign to the method proposed by this association, the members of the committee declined to give it their support, but soon found that the pressure brought to bear in favor of this proposed method rendered the adoption of the method proposed by this association impossible. The legislature passed the bill for the increase of salary and providing for the residence of the members of the supreme court at Lansing, and the bill proposed by this association failed of passage.

The new constitution prepared by the secretary was referred to a committee composed of Fred. A. Maynard, Grand Rapids, William O. Webster, Ionia, and George P. Stone, Ithaca, with instructions to examine its provisions, report it to the association, and also to nominate officers for the ensuing year.

The annual address was read by George H. Durand, of Flint, and it was followed by addresses by Thomas E. Barkworth, of Jackson, upon "Revision of the Constitution;" Eli R. Sutton, of Detroit, upon the affirmative of the question, "Should Michigan Adopt a Code of Civil Procedure?"; Alfred Russell, of Detroit, upon the negative of the same ques-

tion; John A. Edget, of Saginaw, on "Some Reforms in the System of Jury Trial;" and W. H. H. Russell, of Detroit, on "California System of Codes."

The report of the committee to examine the new constitution recommended its adoption with a few changes. The constitution was adopted and the following officers elected for the ensuing year: President, George H. Durand, Flint; secretary, Ralph Stone, Grand Rapids. treasurer, Edmund D. Barry, Grand Rapids; board of directors, the president, secretary, Fred A. Maynard, Grand Rapids, Levi T. Griffin, Detroit, and Thomas E. Barkworth, Jackson. On motion, a vote of thanks was extended to those who had prepared papers. Adjourned.

PRESIDENT'S ADDRESS.

EDWARD CAHILL.

Gentlemen of the Michigan State Bar Association: This is our third annual meeting. After three years we ought to be able to determine by the attendance and interest manifested, whether the bar of Michigan desires to maintain an organization, or whether it is doomed to be more of a burden than a help. There are more than two thousand practicing lawyers in this state. It is a moderate statement to say that they are up to the average of citizens in learning, general intelligence, and force of character. They are not below it in honesty and uprightness. It is their special business to know what laws are needed in the commonwealth, and they have no overpowering interest opposed to the common good. These things being considered, it is easy to see that the lawyers of Michigan are capable of becoming a great power in the state if they can be united in a right purpose. It is a matter of history that for hundreds of years the lawyers have dictated the civil policy of all enlightened states, not always wisely or beneficently it is true, but effectually. Is it not likely that the judgment of the bar of Michigan, if concentrated upon a line of policy, after deliberation and consultation with each other, would be not only hard to withstand as an intellectual force, but as nearly safe, judicious, and right as the judgment of any other body of men that could be brought together? Lawyers, as a class, possess great independence of judgment, and they find it hard to subordinate their individual to the collective judgment of their brethren. We lack the *esprit de corps* that holds together other professions and callings, and enables them by unity of action to accomplish great results.

If one thousand of the active, stirring lawyers of this state were members of this association, and conscientiously devoted one to two days each in the year to advancing its interests and the interests of good government generally, no public opinion could withstand their advocacy of a righteous cause.

The constitution requires the president to open each annual meeting of the association with an address in which he shall communicate the most noteworthy changes in statute law on points of general interest made in the state and by congress during the preceding year. If the president's address is to be confined to a review of noteworthy legislation in this state or by congress during the past year, it might be omitted altogether without serious loss.

The closing days of the first session of the fifty-second congress witnessed merely the careful skirmishing that preceded the political battle in November. Both sides kept well under cover, advancing only so far as was necessary to discover the enemy, and then retreating. The last session of the same congress was held after the smoke of the battle had cleared away. The vanquished were allowed to occupy the field, but only to bury the dead. I was not able to procure a copy of the laws passed at the second session until a few days ago. A somewhat hurried examina-

tion discloses but two acts that can be said to possess any general interest. By the decision of the supreme court of the United States in the Counselman case, 142 U. S., 547, the interstate commerce act was reduced almost to a barren ideal. The commission could not in many cases secure the evidence necessary to determine the questions submitted to it. The railroads, emboldened by the practical difficulties in the way of enforcing the law, disregarded it when their interests lay in that direction. The act of February 11, 1893, is intended to give the commission and the courts power to compel witnesses to testify and to produce books and papers. It deprives them of all benefit of privilege by relieving them from liability to prosecution growing out of any transaction concerning which they testify. The former statute on the subject only relieved the witness from liability of having the testimony given by him used against him upon the trial, but it did not relieve him from prosecution altogether, and the supreme court held that while the testimony given by him might not be used against him, still such testimony might be made the means of securing other evidence necessary to secure his conviction.

One other act not very important in itself, is yet important as evidence of the tendency of recent legislation on the part of the federal government. The act of March 2, 1893, is entitled: "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes." This act is to take effect after January 1, 1898.

The limits of the federal power over matters heretofore regarded as being within the exclusive jurisdiction of the states is being radically extended under cover of the constitutional right to regulate commerce between the states. Another illustration of the same tendency was shown in the anti-option law which failed to pass, but not altogether on account of constitutional scruples. To those who believe in the idea of a nation as is commonly said with a big "N," there is nothing in this legislation that is specially noteworthy. But to those who watch the old landmarks of federal power and would guard the rights of the states from any encroachments these forays of the national congress into the domain of legislation heretofore conceded to the states, is full of interest if not alarm.

The legislature has been in session five months, and in that time has passed something over 450 acts, about half of which are of a public, and the other half of a private character. Among the private acts, I include those for the incorporation of cities and villages, of which there were in round numbers an even hundred. These bills receive more or less consideration in committee, but many of them were not read in either house.

Some radical reform is needed in the manner of incorporating cities and villages. A wise legislative policy requires that general laws should be enacted upon this subject, and that the application of such laws be turned over to some administrative officer or body, as in the case of private corporations. The cities of the state, excepting perhaps Detroit, could without loss to any, be divided into three grades. *First.* Those having a population of 5,000 and not exceeding 20,000. *Second.* Those having 40,000 and not exceeding 50,000. *Third.* All above 50,000. A carefully prepared charter for cities in each of these grades would secure to all a better form of municipal government than most of them now secure, and cities seeking to be incorporated, or when dissatisfied with their present

charters, should be required to incorporate under these general laws. An act has just been passed providing for a commission to prepare and report to the next legislature some village and city charters. It is doubtful, however, if this act goes far enough. A constitutional provision restricting the granting of special municipal charters will be required before a stop can be put to such action by the legislature. We have long had general laws for the incorporation of cities and villages, but few cities or villages seem to be willing to incorporate under them. It is doubtful if those having the matter in charge in any particular city, take pains to inform themselves as to the provisions of the general law, or would be able to give an intelligent reason why they were unwilling to incorporate under it. Is it provincial egotism which leads them to suppose that whatever may answer for other cities, nothing but a new charter will do for them.

To accomplish the incorporation or re-incorporation of a city under a special charter involves great labor and expense. Committees are appointed, counsel employed, and the result of the combined labor is, in the case of cities already incorporated, generally reported to the city council, or, in the case of new cities, to some mass meeting of citizens, by one or the other of which bodies, as the case may be, it is torn and rent until there is little left by which its authors can recognize their work. Under the present plan all the labor incident to the preparation of a charter may well be foregone by one who desires to impress his own ideas of municipal reform upon his own city charter. The wise man will suffer the labor to be done by others, and at the last moment he will seek out his own senator or representative, and by such arguments as he thinks conducive to success secure the engrafting of his ideas upon the bill. They will then become the law without the knowledge of any one except himself and the member whom he has taken into his confidence. A wise legislative policy requires that general laws should be enacted upon this subject, and that the application of such laws be turned over to some administrative officer or body, as in the case of private corporations.

More than one hundred purely local acts, not connected with the incorporation of cities and villages, were passed at the last session, many of which had no other purpose than to authorize some particular locality to set aside the general laws of the state. These bills, it may said, are only passed when desired by the locality affected by them; but what means has the legislature of ascertaining that fact? A bill is proposed authorizing a township to borrow money for some local purpose, or to authorize a township or county to raise money by taxation for some local purpose, in excess of the amount authorized by the general law. It is probable that such measure is supported by a local sentiment more or less strong, but the legislature has no means of ascertaining whether this sentiment is that of a majority of the citizens to be affected by it. If the general laws restricting the amount of money that can be raised for local purposes are to be set aside whenever a locality requests it, would it not be better if the general laws were repealed altogether and such matters left to be determined by local elections. This local legislation is also a fruitful source of jobbery. I do not mean by this that votes are bought and sold for money, but these bills are used by members as a means of coercing others to vote for measures which they do not altogether approve.

It cannot be said that many bills of general public interest passed the last legislature. The first bill to become a law was that for the repeal of the so-called "Miner law" of 1891; but while the law itself, at the time

of its enactment, excited a very general interest throughout the country as being a very radical departure in the manner of electing presidential electors, its repeal has excited much less interest. Whatever may be the opinion of people as to the general policy of the law, if it should be applied to all the states it is doubtful whether a considerable minority of our people would be willing to have our state stand alone as the exponent of it.

The passage of the bill for the taxation of inheritances marks an important event in this state. It is safe to say that a great diversity of opinion exists as to the justice of such taxation. "Lawyers and laymen have pronounced it unconstitutional. It has been styled an 'infamous measure of taxation,' 'a penalty on death, 'stealing from the state by legislative authority,' 'an outrage that can only find precedent in oriental autocratic governments.' It has been objected to as a double taxation."

In spite however of this severe language, we have the authority of a writer in the *Review of Reviews* for saying that nearly every civilized country has an inheritance tax as a part of its fiscal system. England, France, Spain, Italy, Germany, Switzerland, Austria, Belgium, Holland, Denmark, Norway, Russia, Poland, Roumania, Monaco, Australia and Ontario, all have inheritance taxes. In this country some of our states tax direct and a large number of them tax collateral inheritances. It is no part of my purpose to discuss the justice of this tax, but to report the enactment of the law as an important event.

Another and more unique measure has just become a law. It provides that persons arrested for drunkenness may have their choice of a term in the county jail or a course of treatment in an institute for the cure of drunkenness. This legislation is the first general law of its kind, although I believe in Iowa there are local laws and ordinances of the same sort which have been in force some time and appear to be successful. It is said that this innovation in the practice of the court is in accord with the theory upon which penitentiaries and houses of correction are established and maintained. They are punitive institutions, but punishment is not the main thing. The main purpose is reform, and in keeping with this idea, it is said that the state may with propriety select its own method of treating drunkards. It is too early in the history of this class of legislation to form any judgment as to its value.

Another radical measure passed by the last legislature is the one attempting to confer upon women the right to vote at municipal elections. Upon what grounds this legislation can be justified in view of the fact that the constitution prescribes the qualifications of electors at all elections and it does not include women as among those entitled to suffrage, I confess myself unable to understand. I have heard it intimated that those favoring this legislation did so upon the ground that municipal elections are not included in the words "all elections" as used in the constitution; that such words apply only to the election of constitutional officers,—that is to say, officers expressly enumerated in the constitution and whose elections are expressly provided for.

Sec. 14, Art. 15 of the constitution provides that "judicial officers of cities and villages shall be elected and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." Is it to be supposed that the judicial officers referred to in this section are to be elected in any other manner than that prescribed in the constitution? If not are such officers to be elected at a different time

and a different manner from the other officers whose election or appointment the legislature is authorized to provide for? Has the word "elected" as applied to other officers in this section a different meaning from the same word as used in connection with judicial officers in the earlier part of the section? If not are not all officers if elected to be elected by qualified electors? Without desiring to express a matured opinion that shall be regarded as hostile by those favoring this legislation, I may be allowed to intimate a serious doubt of its constitutionality.

Since the last meeting of the State Bar Association, a number of the circuit judges of this state have contributed articles to the "*Michigan Law Journal*," upon the general subject of the condition of business in the circuit courts. Most of them seem to agree that the number of our circuits is too large and that they might be reduced in number to the advantage of the state. No effort seems to have been made however, by the last legislature to carry out these views. On the other hand a new circuit, the 34th, has been created and a new judge added in the Wayne circuit.

Sec. 2, Art. 20 of our constitution provides that in each sixteenth year after 1866, the question of the general revision of the constitution shall be submitted to the electors qualified to vote for members of the legislature, and in case of a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the legislature at the next session shall provide by law for the election of such delegates to such convention. At the regular election held in November last, this question of a general revision of the constitution was submitted to the people and carried in favor of such revision. The legislature, in violation of the express mandate of the constitution, has refused to provide for the election of delegates to a constitutional convention. This presents a novel situation. If the executive or judicial departments of the government willfully violate the constitution, that instrument has provided for their impeachment, but no method is pointed out by which the legislature itself can be made to answer for its disregard of the fundamental law of the state.

The regular biennial law was passed as usual. This is the fifth general tax law passed since 1882. Except in matters of minor detail which could have been taken care of in a few sections, these bills have generally not differed from each other. I have not been able to examine the law passed, but I understand it to differ from the act of 1891 chiefly in that it provides for a return to the state system of caring for delinquent taxes. The mortgage feature of the law of 1891, which required the mortgage to be taxed as an interest in the real estate, is also repealed and mortgages are to be taxed as personal property as heretofore.

At the last annual meeting of the association the chief topic introduced by the president in his annual address and followed by elaborate discussion, was the question of how the supreme court could be relieved so as to be able to keep abreast of the business. Among those who participated in the discussion, either by letter or in person, were three of the present judges of the supreme court, and three of the former judges. As a result of such discussion, the general subject was referred to the standing committee of the association on jurisprudence and law reform, with instructions to formulate a plan and report the same to an adjourned meeting of the association to be held the third week in January. The committee afterwards appointed, and to which this matter was referred, consisted of

T. J. O'Brien of Grand Rapids, Geo. W. McBride of Grand Haven, John C. Patterson of Marshall, A. J. Mills of Kalamazoo, and Geo. F. Robinson of Detroit. The committee prepared a report which was read at the January meeting. The report favored the establishment of an intermediate court. There was a large attendance present at the January meeting, and the general subject which it had been called to consider was very thoroughly discussed. As the discussion proceeded it was evident that a large majority were opposed to the conclusion reached by the committee and favored the relief of the court by the election of additional judges. There was much difference of opinion as to the number of judges that ought to be added, and as to the details of the plan by which the court was to do business if the additional judges should be provided for. As a result of the discussion a resolution was finally adopted declaring it to be the sense of the association that the best method of relieving the pressure of business of the supreme court was to increase the number of judges by five. A committee of three was appointed, of which the president was made chairman, and authorized to prepare a bill in accordance with the resolution adopted, and present to both houses of the legislature.

The committee appointed at the January meeting has prepared and will submit a report of its action, and of the failure to procure the passage of the bill recommended by that meeting. When it was found that the bill for the election of additional judges could not be passed an effort was made to pass a joint resolution proposing an amendment to the constitution which would allow the legislature to establish intermediate courts. This effort was likewise unsuccessful. The legislature was apparently unwilling even to allow the people to express an opinion in favor of an intermediate court, if they desired to. I cannot account for the utter disregard by the legislature of the wishes of the state bar association. The association is too small in numbers, but the judgment of even three hundred trained lawyers ought to have some weight. The members of the legislature who were members of the bar did not, however, seem to consider the action of the association as entitled to any special consideration.

If we are to continue our labors as an association an effort should be made to so increase our membership that it will be understood to have power as well as opinions, and to establish such a rule of discipline among us that when a line of conduct is adopted by the association we shall be able to rely upon an enthusiastic and hearty support of the measure all along the line. Unless this can be done we may as well disband. I for one do not care to belong to a body that is not able to command respect.

As a means of increasing the membership of our association, and of strengthening the bonds of fraternity that ought to exist between us, the "Michigan Law Journal" is a most effective agency. The trouble with us is, not that we do not take an interest in the association when it is brought to our attention, but that we are liable in the press of other matters to overlook it. The "Michigan Law Journal," devoted as it is to the interests of the profession and of the association, keeps our interest revived. I shall be glad if steps can be taken looking to the increased circulation of this journal among the lawyers of this state.

I deem it advisable that our constitution and by-laws should be revised. They are too long and too cumbersome for practical work; especially is this true of those provisions relating to the admission of new members. I would suggest that a committee be appointed for the purpose of considering this question and reporting to the present meeting.

THE MISSION OF THE STATE BAR ASSOCIATION.

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RALPH STONE.

In the more vigorous and active state bar associations in the country the secretary's report takes the form of a resume of the year's work of the association. If such were the case in all of the state bar associations the secretary's report in a large majority of them could be encompassed in a very few sentences; for, as a matter of fact, there are not more than half a dozen of such associations which do any work at all, or exist for any useful purpose. In the order of their activity and usefulness to the profession the following are the only state bar associations which seem to have justified their existence: New York, Illinois, Ohio, Missouri, Virginia and Georgia. The secretaries of these associations, having better opportunities, perhaps, than any other officer to observe the workings and to note the needs of their associations, submit annual reports which not only deal with the practical work of the past year, but suggest new fields into which their associations can extend their influence, and propose plans by which they can render their organizations effective agents in promoting beneficial and checking hurtful legislation and in advancing needed law reforms.

As secretary of the Michigan State Bar Association it is my duty to submit an annual report. If I were to confine myself to reciting the progress that has been made or the work that has been accomplished during the year past my report would be a brief one indeed. But if I am permitted, in addition, to offer a few suggestions as to how our association can be transformed from an inactive, dormant, devitalized body into a vigorous, active, influential organization, my report must perforce assume greater proportions. I have been appointed by the board of directors, to which is assigned by the constitution the duty of preparing the programme for the annual meeting, to read a paper before the association upon "The Mission of the State Bar Association." I have taken the liberty to embody what I have to say upon the subject assigned to me, in my report as secretary, since my views as to the mission of the state bar association spring entirely from the experience I have had and the observations I have made while secretary of this association.

The original call for a meeting to organize a state bar association in this state was issued during February, 1890. It was signed by fifty-four Detroit lawyers, fourteen Marquette lawyers, fourteen Kalamazoo lawyers, and one attorney of Big Rapids. Fifty-five Grand Rapids attorneys signed a written agreement to attend the meeting for organization, if possible. On February 22, 1890, a meeting was held in the United States court room, in the city of Detroit, at which it was unanimously decided to organize. Articles of association were adopted and a committee appointed to draft a constitution. At a meeting held at Detroit on June 2, 1890, the constitution was adopted and organization effected by the election of officers, Henry M. Duffield of Detroit being chosen the first president of the association. The membership during the first year was 234,

covering twenty-three cities and towns. The articles of association were drafted in accordance with the provisions of an act of the legislature of Michigan entitled, "An act to authorize the formations of incorporations of associations of members of the bar," approved April 25, 1881. (How. Stat., Sec. 4,502 *et seq.*) I am informed by the secretary of state that there is no record of the filing of these articles of association in his office. The state bar association is, therefore, not incorporated as has been generally supposed. It is not expedient, from one point of view, that it should be incorporated, inasmuch as the law provides that the articles shall prescribe the time and place of the annual meeting, while it is desirable that the date and location of annual meetings shall change from year to year. As far as the records in my possession show, the articles of association are signed by eight Marquette and four Ishpeming attorneys, three less than the requisite number.

The second annual meeting of the association convened at the Hotel Cadillac, Detroit, on June 16, 1891, in the evening. The only business transacted was the election of officers for the ensuing year, Thomas J. O'Brien of Grand Rapids being chosen president, and the presentation and adoption of a report of the committee on legal education and admission to the bar made through its chairman, Levi T. Griffin of Detroit. This committee had prepared and caused to be introduced into the legislature a bill regulating admission to the bar, providing for a committee of nine, to be appointed by the chief justice of the supreme court with the concurrence of the associate justices, whose duty was to examine applicants for admission to the bar. The bill slept in a pigeon hole throughout the session, and never became a law. At this meeting a banquet was held. The membership during the second year was 230, a decrease of three, and twenty-three cities and towns were represented.

The third annual meeting was held in the circuit court rooms at Grand Rapids on July 26, in the afternoon, being adjourned from the date fixed by the constitution. The only business transacted was: The election of officers, Edward Cahill of Lansing being chosen president; the discussion of that portion of the address of the retiring president relating to the congestion of business in the supreme court of the state and the proper method of relief; the appointment of a committee to investigate the question and report a plan to an adjourned meeting to be held on the third Tuesday in the following January at Lansing, and the adoption of the "Michigan Law Journal" as the official publication of the association. A banquet was held in the evening at the Morton House, at which Judge Michael Brown of Big Rapids read the annual address upon "The Profession of the Law."

I was invested with the office of secretary at that meeting, and have to report that the association has during the past year increased from 230 to 331 members, that there has been one resignation, and that four members have been taken from us by death, viz: Charles Stuart Draper, of Saginaw, and Edward S. Eggleston, Leonard A. Ward and James Blair, of Grand Rapids. The number of cities and towns represented in the association has increased from twenty-three to sixty, so that at present the association covers every section of the state. The committee on relief of the supreme court, being the standing committee on jurisprudence and law reform, instructed at the third annual meeting to prepare a report, recommended the establishment of an intermediate appellate court, and submitted its report to the adjourned meeting held in the supreme court

room at Lansing on January 17, 1893. The association decided at that meeting to recommend to the governor and the legislature an increase of five in the number of justices of the supreme court. A committee, consisting of Edward Cahill, Lansing; George P. Wanty, Grand Rapids, and Levi L. Barbour, Detroit, was appointed to draft a bill carrying out the suggestion of the association and cause it to be introduced in the legislature. The bill was promptly prepared and as promptly introduced, but failed to pass.

I have thus rapidly sketched the history of our association from its organization to the present date. I am commissioned to point out, as well as the limitations of my experience and ability will permit, the mission of a state bar association. Having the foregoing history of the Michigan state bar association in mind, I can truthfully say that if this association was brought into existence to fulfil a mission it has failed signally. It has met every year, elected officers every year, and held a banquet every year. Only two of its seven committees have submitted reports, and it is safe to assert that these two reports would never have been prepared had not these committees been forced into activity by special instructions of the association. Both of these reports resulted in the framing of bills, and then the association rested, the measures failing of enactment. The two meetings held since the meeting of organization were not well attended, so that it may be said, with strict adherence to the truth, that beyond the benefits of social intercourse between the few members of the bar who have attended the annual meetings the association has lived a profitless, aimless and a missionless existence. The objects of the association are set forth in article I of the constitution: "To advance the science of jurisprudence; promote the administration of justice; uphold the honor of the profession of the law, and encourage social intercourse among the members of the Michigan bar." It has done none of these things, and it is highly probable that, unless some radical steps are taken at this meeting, the association will pass through at least another year of inactivity and uselessness. If this association has a mission it is time that it was discovered.

To those who have taken the trouble to review the work of the association since it was created, it is apparent that there is something radically wrong in its organization. In short, it is too much organized. The constitution of the association is too cumbrous. It prescribes too much work for an organization of this character. It distributes the power and responsibility over too much ground and vests it in too many officers and committees. In fact, the constitution is a marsh instead of a stream confined within well defined banks. It has forty-five officers and seven standing committees, and in three years they have accomplished practically nothing. The reason is, the responsibility is not centralized, and in fact is not located anywhere. There is a president, eleven vice-presidents, a secretary, a treasurer, a board of directors of nine members, a general council of eleven members and a local council of eleven members. With all of this machinery nothing has been done, and it is simply because there is too much machinery. The constitution provides for standing committees but fails to prescribe their duties, and the inevitable result is, no work and no reports. The committees are: On jurisprudence and law reform; on judicial administration and remedial proceedings; on legal education and admission to the bar; on commercial law; on international law; on publications; and on grievances. The first two cover almost the same

field. International law does not legitimately concern a state bar association. The "Michigan Law Journal" attends to all our publications, and grievances can be heard and adjusted more satisfactorily by special committees when the occasion arises than by a standing committee. Two standing committees, on law reform and on legal education and admission to the bar, can do all the work of the association, and if anything should demand the attention of the association which does not fall within the jurisdiction of one of these committees, it can be referred, with more certainty of investigation, to a special committee appointed from among those who are especially interested or peculiarly qualified. There are a number of other provisions of the constitution which will bear revision in the light of the three years' experience of the association, but they can be pointed out only by a critical analysis of the instrument, which it is not within the province of this paper to undertake.

What is first needed, then, is a new constitution, which shall above all things be brief, which shall provide but little machinery and that not intricate, concentrate the power and responsibility for the successful prosecution of the work of the association in the hands of a few leaving all minor matters of routine to their discretion, and provide for only two or three standing committees and define their duties sharply. Those who have served on committees or as active officers of the association will appreciate the need of these changes. Those who have not may not be able to understand why it is that the association has not served the purpose of its organization.

I have prepared and submit with this paper, as "exhibit A," so to speak, a new constitution for the association. It is brief. It is simple. It provides for only three officers, a president, secretary and a treasurer. The president and secretary with three members elected by the association constitute the board of directors in which is vested full power to manage the affairs of the association. Two standing committees only are provided for, on legislation and law reform and on legal education and admission to the bar, and their duties are very carefully prescribed so that it is compulsory upon them to prepare reports and to do effective work. This constitution is drafted after a lengthy correspondence with the secretaries of all the state bar associations in the country, after a careful examination of the constitution of each state association, and in the light of the experience of all of them.

There are twenty-nine (29) state bar associations in the country, in the following states, in various stages of activity: Alabama, Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New York, Ohio, Oregon, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and New Mexico Territory.

The Alabama association is quite active, has a membership of 200, and the proceedings are of the same character as our own. The secretary says, "At the last meeting of the association we held the second day's session at Jackson's Lake, a very pleasant summer resort six miles from this city (Montgomery), and served a barbecued dinner in lieu of the banquet. Those who attended expressed themselves delighted with the change, and it is probable that the meetings of the association hereafter will be held in this city instead of in the different cities in the state as was the custom heretofore; and, if so, the probabilities are that the dinner on the second

day of the meeting will take the place of the banquet." The Alabama association was organized in 1878.

The Arkansas association, in the picturesque language of its whilom secretary, is dead. It had a membership of 76 when it died. It was organized in 1882 and died in 1890.

The association of the District of Columbia is active, and has a membership of 175, but the annual meetings are not well attended. The special meetings are its most important gatherings, when it discusses and takes action upon legislation affecting the District, and more especially the judiciary. The board of directors transacts all the minor business. There is an annual "Shad Bake," so-called, an excursion down the Potomac, which is attended by the members of the supreme court and the court of claims and is a very popular affair. The association was organized in 1874.

The Florida association passed out of existence four years ago. It printed no reports of its proceedings.

The Georgia association is one of the most active in the country. It has a membership of 250, and its proceedings are not different from our own association. The cities in which the Georgia association meets usually tender the visiting lawyers such courtesies as a collation, boat ride, fish dinner, or a reception at the home of some distinguished member of the bar. The association is nine years old.

The Illinois association, next to New York, is the most active in the country. It has 350 paying members. Their meetings, as the secretary writes, "always close with a banquet—with the ladies and without wine." It is in its seventeenth year. The secretary also says: "Our banquet is the social event of the year to many. The papers read in the past sixteen years are many of them gems, eagerly sought after and carefully preserved. To have been a general officer of the association is accounted an honor, and we are proud of our roll. Write us down a success."

The Kentucky association has few members outside of Frankfort, and is not an active organization.

The Ohio state bar association is the third in strength, activity and usefulness. The membership is 450. The proceedings are of the usual type. The association has been in existence thirteen years. It holds its meetings usually at a lake resort, the last one being held at Put-in-Bay.

The Minnesota association was formed in 1886, but has been inactive since the first two years of its existence. Its membership is 200. An effort is being made this year to revive the association.

The Missouri organization is the fourth in strength and influence. It is very active, and has a membership of 300. The annual meetings are well attended and the proceedings are typical of all bar associations, with occasionally a novelty in the shape of formal debates on legal questions. The annual meetings sometimes close with a banquet and ball, participated in by the wives and daughters of the members. The association is twelve years old.

The Montana association, in the words of its secretary, "is in a comatose state, if not really moribund." Its membership is 125. The proceedings are confined to routine matters. The association is eight years old.

The New York State Bar Association is the banner organization of its kind in the country. It is exceedingly active, and its activity extends through its membership to the profession in all parts of the state. Its

membership is about 1,000. The secretary says: "Our membership could be greatly enlarged did we desire to enlarge it by a careless election of members, but our object is to obtain a membership composed of the ablest and most respectable members of the profession in the state. This object we have attained and are attaining." The annual meetings of the New York association are very largely attended, and are considered the most interesting and important events which take place at the state capital during the winter. They are held on the third Tuesdays, Wednesdays and Thursdays of January each year. The proceedings do not vary from the usual papers, addresses, etc. A banquet is usual, although this is occasionally varied by a reception tendered by the governor. The association is seventeen years old.

The Oregon association is three years old, has a membership of 200, its meetings are fairly well attended, and the proceedings are of the usual character.

The South Carolina association is active, has a membership of 243, and its meetings are attended by about 40 per cent. of its members. It is seven years old.

The Tennessee organization is not very active. It has a membership of 325, but its meetings are not well attended. They are chiefly of a social character. The association is twelve years old.

The Virginia association ranks among the first six in vigor and usefulness. It has a membership of 439, and its meetings are largely attended, the last one being held at Old Point Comfort, and the next will be held at White Sulphur Springs. The association was organized in 1888.

The West Virginia association is not very large but fairly active. It was organized in 1886. The proceedings are of the usual character.

The Wisconsin association, says the secretary, is "very decidedly inactive. For the last few years it has existed, but without much sign of the breath of life." The membership is 350 and the regular meetings are not well attended. The association was formed in 1878.

The New Mexico association is a small organization, only 75 members, but it is active and its annual meetings are well attended being however strictly business meetings. The association was organized in 1886.

In order to determine the mission of a state bar association, a review of the experience of other state bar associations will be profitable. Have these associations in other states exerted a beneficial influence upon the profession? is the inquiry of first importance, because if bar associations do not benefit lawyers, they have no *raison d'être*. Have they served a useful purpose as watchers of legislation, and have they always sounded the alarm against improvident or vicious measures affecting the law or its practice? is the second pertinent query.

In very few of the states have the associations exerted a perceptible influence for good upon the profession. Alabama, Georgia, Missouri, New York, Virginia and Wisconsin are notable exceptions. In Alabama, the association has the power to institute proceedings against attorneys, and the fear of such prosecution has often compelled dishonest attorneys to at least preserve some degree of fair-dealing with clients. In Missouri the association caused the standard of examination for admission to be raised and succeeded in securing the enactment of a statute upon the subject and inducing the courts to more strictly enforce it. In Wisconsin, the association was chiefly instrumental in enforcing more stringent rules in relation to the admission of members to the bar, in removing from the

courts the responsibility of passing upon admissions, and in procuring the appointment of a commission who pass upon all admissions by means of very strict examinations which afford the only means of admission to the bar, except by graduation from the law school. The secretary of the Montana bar association deplotes the fact that their association is so inactive and that no steps are being taken to guard the profession from the pettifoggers and shysters who, according to his testimony, are crowding that section of the country.

There is an influence which the bar association exerts upon the members of the association, and not upon the profession generally, which it is difficult to measure. It is the influence for good which arises from the meetings themselves, from the gathering together of the best lawyers of the state, the enjoyment of social intercourse, and the cultivation of a brotherhood of the bar. This, indeed, is one of the very best features of bar associations, and it is one which should be encouraged as well as the more practical features of such organizations.

It used to be thought that the chief mission of a state bar association was: First, to afford an opportunity for lawyers to get together and enjoy themselves; and second, to guard the profession from the admission of incompetents, pettifoggers, shysters and tricksters. Those are still the avowed objects of such organizations. But there is a belief which is rapidly gaining ground among the abler and better principled lawyers, those who take a pride in maintaining the ethical standard of the profession and who entertain lofty conceptions of the real duty of the members of the bar, that the legal fraternity has a mission other than the charging of fees. The renowned jurists of the early English law, in beautiful, sonorous, well-rounded phrases, have told us that the attorney is an officer of the court, that he is the conservator of liberty, that his strong right arm should always be raised in defense of the rights of the people, that because of his training and superior intellectual attainments the community looks to him to guide legislation and protect helpless interests from vicious laws. The young practitioner, just graduated from a law school has these things repeated to him by his instructors, and in addition, he will be admonished to be conscientious, to lead a professional life of rectitude, and above all to be faithful to his client and to the public weal. In periodicals, in addresses before bar associations, and in responses to toasts at bar banquets, the subject of professional ethics is discussed in sentences of marvelous rhetorical beauty and strength. But throughout all this aimless talk and preaching there is one fact that stands out with clearness: The lawyer is a public man. He is something more than a private citizen. Justice Miller of the United States supreme court, in the "test oath cases," said: "That fidelity to the government under which he lives and true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument. The history of the Anglo Saxon race shows that for ages past the members of the legal profession have been powerful for good or evil to the government; they are by the nature of their duties the moulders of public sentiment on questions of government and are every day engaged in the construction and enforcement of the laws. To suffer treasonable sentiments to spread here unchecked is to permit the stream on which the life of a nation depends to be poisoned at its source."

I have already stated that the mission of the bar association is first, to

exert an influence for good upon the profession itself. In the second place, and arising from the fact that the lawyer is a public man, the mission of the bar association is to watch legislation, check everything vicious or harmful, and initiate all bills having for their purpose the reform of the law and its practice. This is a sphere of activity outside the actual practice of the law. Some may say that bar associations do already occupy the field. It is true that eminent lawyers discourse at great length on law reform, and it is an encouraging sign that lawyers appreciate the fact that there are imperfections in the law, that gross abuses exist, and that there is a necessity for reform, but it is the almost universal testimony that nothing is accomplished, because the suggestions are too general or too vague, and there is no organization to carry them through. To those lawyers who show a desire for the improvement of the law and its practice, and an unselfish interest in the welfare of the community sufficiently earnest to lead them to propose reforms, let us submit a request to do what, in another sense, they are only too willing to do—present your little bill.

And herein is a field in which the Michigan State Bar Association can exert an influence which, if properly directed, will demonstrate the usefulness of the association, not only to the profession itself, but to the people of the state. How this association can supervise legislation affecting the law and its practice is a practical question which is answered by the provisions of the constitution (submitted with this paper), which define the duties of the standing committee on legislation and law reform. If there does not exist among the members of this association sufficient pride in the profession or interest in the reform of the law to be willing to devote a portion of their time to the examination and preparation of bills and the careful investigation of questions of law reform, then it were better to disband the association or to amend the article of the constitution, which recites the objects of the association, so as to read: "The object of this association shall be to meet once a year, elect forty-five officers, listen to a number of papers upon which no action shall be taken, eat a dinner, adjourn, and immediately forget all about the meeting and what was said and done there."

In a list of inquiries sent to the secretaries of the various state bar associations of the country, were the following: "What is the influence of your association in the state? Does it have any supervision by committees over legislation? Do its recommendations have any effect upon the legislature?" The Alabama secretary says, "We have had several important measures enacted into laws, although it must be confessed that in the majority of instances, the legislators have not looked kindly upon the association, and frequently measures suggested by the association have been vigorously opposed and defeated by demagogues in the legislature who were lawyers, but not members of the association." The Arkansas secretary says that "Legislators are hard to reason with, and think they know more than anybody," from which it is to be inferred that the Arkansas association has had poor success in securing the enactment of its measures. The Georgia secretary thinks that their recommendations have had a silent influence upon the more thoughtful members of the legislature. In Illinois, the system of intermediate courts of appeal is the direct result of the work of the state bar association, and it is, at present, urging the passage of a bill establishing the Torrens system of land titles. The Ohio secretary says that "when the association desires

any legislation, the matter is brought to the attention of the law-makers by its legislative committee. Its recommendations are generally acted upon and adopted." The Minnesota secretary testifies that the committees of their state bar association "for the first two years attempted to exercise influence over legislation but did not succeed in competing with the lobby and gave it up." The Missouri secretary says that their association "has considerable influence in the state in the selection of appellate judges, and has caused to be enacted the following legislation: Creating of supreme court commission, which greatly aided the supreme court for some years; creating the court of appeals at Kansas City, relieving the supreme court of much labor; adding two additional justices to the supreme court, making seven instead of five; and caused the state to be redistricted judicially at an extra session of the legislature last year." The committees of the New York association, according to the secretary, "operate in harmony with legislative committees in securing the enactment of laws benefitting the legal profession and the judiciary. Its recommendations are always received with respect by the legislature, and have an influence upon it. The senate consists of thirty-two members, about one-half of whom belong to our association. In the assembly there are forty-five or fifty members of the association, including the speaker." The Oregon secretary says, "At the last session of the legislature some laws were passed at the recommendation of the association and committees of the members who had them in charge were enabled to accomplish much good in correcting statutory law that needed revision." In South Carolina some acts regulating the practice of the courts have been passed at the suggestion of the association. In New Mexico, whatever recommendations have been made to the legislature have been adopted.

To recapitulate: What is necessary to be done to galvanize the Michigan State Bar Association into life is to adopt a new constitution which shall be brief, and recite with clearness the duties of the standing committees. In its re-organized condition, its mission should be: (1) To improve the profession in the state and to that end the committee on legal education and admission to the bar must see that the proper safeguards are thrown around admission to practice in the state; (2) to watch legislation and to see that the recommendations of the association reach the legislature in the shape of bills and are given a fair hearing; (3) to cultivate a brotherhood of the bar, and to this end urge a large attendance upon the meetings and the banquet or other social feature.

Whatever positive good has been effected by the Michigan State Bar Association has been largely due to the activity of its presidents. The association has been fortunate in choosing its executive heads, and Messrs. H. M. Duffield, Thomas J. O'Brien and Edward Cahill have done all that could be done, under the present constitution, to render the organization an effective body. The papers read at the annual meetings, and particularly the presidents' addresses, have done much to stimulate discussion among the members of the bar, and have had an indirect result upon legislation and in raising the tone and ethical standard of the profession. But the association has a vast field in which to work and it is capable, when properly constituted, of directing its energies so that its efforts will result in immediate and visible benefit to the profession and the state.

The mission of the state bar association has been admirably expressed by Justice Brown, in an address delivered in July, 1892, before the Ohio State Bar Association. He said: "I, for one, share the general apathy

with regard to them; and I am ashamed to say, while I have been in the habit of attending sessions of the American Bar Association, this is the first state bar association at which I have ever been present. I think the public is beginning to recognize in them a great factor, not only in the promotion of good fellowship among members of the bar, but in their possible influence upon legislation, and upon the selection of competent men for judicial offices. I can hardly imagine the legislature of Ohio refusing to act upon the unanimous recommendation of this association, or passing a law which it shall adjudge to be ill-timed or unnecessary. The time has been, and I think still is, when the members of the bar are the leading members of the state legislature, and I think that an official representation of the members of the bar such as this association is, ought to have a very great influence upon legislation. In fact, I believe that the demand of this age is for manly and fearless men, who have the interest of the profession and of the public at heart; who have the moral courage to call a spade a spade, and who are not so tied up by political and religious affiliations that they are afraid to speak their own minds in any assembly, however unpopular their ideas may be. The bar association of the city of New York, or of the state of New York, if it had no other title to fame than the stand it has taken with regard to two or three questions of public interest, and with regard to the appointment of two or three men, at different times, would have vindicated its right to existence, and established its claim to recognition and to the admiration of the community by those very acts."

THE ANNUAL ADDRESS.

GEORGE H. DURAND.

When a man becomes a lawyer he assumes duties and obligations of both a public and private character. To the public he owes the duty of using his ability and influence for the adoption of good laws, and for the honest and vigorous enforcement of them. He comes an officer of the courts for that purpose. To his clients he owes the duty of fidelity and skillful attention; for their sake he must be willing to stand as a tower of strength against autocratic usurpation as well as public clamor, and, according to the best of his ability, to throw about them the majesty of the law and its guaranteed protection. To perform these functions well requires a high degree of integrity, skill, legal knowledge, patriotism and self-sacrifice, and upon their faithful performance rests the foundation of all stable governments, of constitutional liberty, and even of the state itself.

The thoughtful student of history cannot but be profoundly impressed by the fact that the most refined, prosperous and contented nations of the earth are those who avoid as much as possible the arbitrament of the sword and confide the keeping of their lives and fortunes to the equally strong and more merciful factor of good laws which have been established by an intelligent consideration of the needs of a peaceful people, and which are expounded, enforced and preserved by broad-minded and learned lawyers. And when I say lawyers I mean not only those who are engaged in the active practice of the law as a profession, but judges as well; for judges are but lawyers who are temporarily placed in a position where they are commissioned to make an authoritative enunciation of what the law is as they sit in judgment on the more or less divergent theories of adverse counsel who are engaged in presenting to a court the usually persistent and often passionate contentions of their respective clients.

Good laws are the outgrowth of a quickened conscience, of a thorough education in the rules of common honesty, and of a continued recognition of what is right, just and equitable between man and man. In order, therefore, that a people may be blessed with good laws, it follows that their establishment and enforcement must be confided to wise, able and just men. To expect that they can be either made or enforced otherwise is contrary to all human experience and would operate as a reversal of that familiar order of nature by which we have learned that figs do not come from thistles, and that ordinarily a good tree does not bear bad fruit.

The struggle for the supremacy of the law over brute force has always been relentless and incessant, and it has only been by a constant warfare against autocracy and tyranny that law has become a living principle in civilized nations, and the people taught that might is not always right, and that justice administered under beneficent laws is greater than a crown. While in the nature of things all men do not see alike as to what the law is or shall be, the tribunals are organized with power to

finally determine it. The delicacy of the duty to be performed, the momentous interests involved, both of persons and state, and the far-reaching consequences which may attach to a pronunciamiento of the law, all prove in the most impressive manner how much care should be exercised in the formation of these tribunals so that they may be absolutely free from bias or prejudice and unencumbered by complications which may warp the judgment to a perversion of justice. Tyrants, adventurers and bad men, whether crowned or uncrowned, have always been the enemies of good laws and fair courts. They have always found it easier to carry on nefarious schemes by yielding to the caprices of a designing monarch or an ambitious party, or even the clamor of a misguided rabble, than to submit their wrong-doings to the scrutiny of tribunals expressly created for the purpose of doing justice, and of rendering to each man his just due without regard to his station in life. On the other hand, lawyers as a class have always been the friends and supporters of good laws and fair courts.

I wish to call your attention to a single circumstance, gleaned from familiar history, which I quote for the purpose of illustrating the truth of what I have stated, and also to accentuate the idea that lawyers have public duties to perform as well as those which are of a personal or private character. King James grew restive because the courts of England claimed and exercised the prerogative of passing judgment upon the rights of persons under the laws of that realm. Like other rulers, before and since, he claimed the right to rule England as an absolute sovereign. Through a so-called court of high commission, a court originally established for causes of an ecclesiastical nature, which was governed by no fixed rules and from whose judgment there was no appeal, he attempted to subject all persons, both lay and spiritual, to its jurisdiction, even going so far as to send state messengers to the house of any person complained against to arrest him and to imprison him. The matter being called to the attention of the courts, Lord Chief Justice Coke, supported by his brethren on the bench, bravely repelled this usurpation of power and held that the practice was contrary to Magna Charta, and that if the parties engaged in the unlawful proceedings should be killed in their attempt, the person resisting would not be guilty of murder. In the face of this courageous resistance by the court, the high commission was for a time silenced. The jealousy, however, of the king and his sycophants because of the power exercised by the courts still continued. There was constant plotting to transfer from the courts to the king all the important safeguards which the law gave to the people, until finally the archbishop suggested that the king had the power of judging whatever cause he pleased in his own person, free from all risk of prohibition or appeal. This was such a pleasant suggestion that the king summoned all the judges before him and his council at Whitehall to know what they would say against this proposal.

The archbishop, to sustain his position, used this specious argument: "The judges are but the delegates of your majesty and administer the law in your name. What may be done by the agent may be done by the principal; therefore your majesty may take what causes you may be pleased to determine from the determination of the judges and determine them yourself; this is clear in divinity, and such authority doubtless belongs to the king by the word of God in the scriptures." At this critical juncture and in brave disregard of the power which could make and unmake judges, the

high character of our profession was maintained in all its dignity by Lord Chief Justice Coke, in whose opinion all the judges concurred, and who in brave defiance of the king, and his adherents who favored usurpation so that the courts which are the people's defenders, might be degraded and shorn of their power, said: "By the laws of England the king in his own person cannot adjudge any case, either criminal as treason, felony, etc., or between party and party concerning his inheritance or goods, but these matters ought to be determined in some court of justice. Richard III and Henry VII sat in the star chamber, but this was to consult with the justices upon certain questions proposed to them and not *in judicis*; so in the king's bench he may sit but the court gives the judgment. Ergo, the king cannot take any cause out of any of his courts and give judgment upon it himself. No king since the conquest has assumed to himself to give any judgment in any cause whatsoever which concerned the administration of justice in this realm. So the king cannot arrest any man, for the party cannot have remedy against the king; so if the king give any judgment what remedy can the party have. We greatly marveled that the most reverend prelate durst assert that such absolute power and authority belongs to the king by the word of God, which requires that the laws even in heathen countries be obeyed. Now it is prescribed by Magna Charta that no man shall be put to answer but with presentment before the justices, or by due process according to the law of the land, and anything done to the contrary shall be void. True it is that God has endowed your majesty with excellent science as well as great gifts of nature, but your majesty will allow me to say with all reverence that you are not learned in the laws of this your realm of England, and I crave leave to remind your majesty that causes that concern the life or inheritance, or goods, or fortunes of your subjects are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it. The law is the golden met-wand and measure to try the causes of your majesty's subjects, and it is by the law that your majesty is protected in safety and peace."

Before this master-piece of logic, this learned disquisition on the law, even the king hesitated and shortly abandoned the claimed usurpation. While the king did not admit that he abandoned it in terror of Coke and his masterful defense of the right of every man to have his day in a legally constituted court, yet as a matter of fact history tells us that he did so on that account. The reason however which King James announced to the people why he abdicated his right to act as judge was an entirely different one. It was a reason which no doubt under the circumstances by which he was surrounded was more satisfactory to his mind, and more gratifying to his kingly pride; it was a reason so like what many a judge of the present day would give to the public if he should resign his judicial functions that I will be pardoned for repeating it; it was this: "I am sorely perplexed when I have heard both sides. I could get on very well hearing one side only, but when both sides have been heard, by my soul, I know not which is right."

This sturdy defense by Lord Coke and his contemporaries of the right of a law loving people to be governed and protected by the law, saved England from anarchy, preserved personal liberty, and furnished an object lesson for all who have come after them to study, an object lesson which should never be lost sight of when the subject of what duties law-

yers are under of a public character is being considered. And this brings us to the questions which concern us of the present, and the duties and obligations we owe to each other, to society and the state.

Our first duty is to induce if possible every reputable lawyer in the state to become a member of the Michigan State Bar Association. Until this is accomplished the bar is without state organization, and therefore without state influence. In these days of unions and combinations, of all kinds, colors, and degrees, it is a lamentable fact that individual effort, however intellectual and unselfish it may be, is powerless to obtain legislative relief upon subjects of general public importance. All the lawyers of this state acting separately as individuals, would, I fear, have much less influence in obtaining needed legislation upon any subject than would be accorded to a small but organized body like the nine worthy gentlemen who once denominated themselves as "We the people of England."

While this state of things may not be very flattering to our pride, yet it is true, and therefore the sooner we accept the motto "In union there is strength," the better it will be not only for the profession but for the people of the state. In the language of another, we are confronting a condition not a theory, and the more promptly and bravely it is confronted the grander will be the results achieved. The organization being perfected by a full membership, the association should have meetings of sufficient duration to permit of discussion as well as the formulation of such laws as would seem to be best adapted to secure a more speedy and perfect administration of justice. That the fountain of justice may be kept pure, and that the courts may be surrounded by an atmosphere free from the taint of bias and prejudice of every name and nature; every judge in the state should be present at these meetings giving his aid and counsel, and keeping in touch with the lawyers, without whose intelligent and honest assistance even the courts would be impotent and justice too often miscarry.

After agreeing upon what should be done, committees authorized to speak for the entire association should be selected to petition for such legislation as is wanted to correct some of the more glaring abuses which exist in the state and of which every good lawyer is cognizant, and through which unfortunately too many of his clients are compelled to suffer great wrong and outrage. The legislature should first be asked to keep the administration of the law in the hands of lawyers of learning and integrity by preventing the almost indiscriminate admission of applicants to the bar which now obtains. Every man who aspires to be a lawyer and to become, as he must, an integral part of every court before whom he may practice, should be required to devote a reasonable and a fixed time to a careful study of the law in its various branches, and then to demonstrate to a commission appointed by the state that he has such a degree of legal learning, character, and integrity as to be a perfect assurance that the interests of his clients and of the state will not suffer by conferring upon him the dignity to which he aspires to attain. Legal learning, and good character, and love of the profession should be made the test, instead of the misguided local sympathies which have too often conferred the title of attorney at law upon unlearned and unworthy men. The word "bank" painted over the door of a "wild cat" concern with no moral or financial responsibility back of it often assists in the robbery of honest but ignorant and unthinking people of their hard earned money, and straightway the loser will as thoughtlessly attach irresponsibility and dishonesty to all

banks. The title of lawyer conferred upon an unlearned or dishonest man produces the same results, and the whole profession is made to suffer by the conduct of some one who, notwithstanding the sign of lawyer, which has been painted upon him, never was a lawyer, is not now a lawyer, and who never will become one. Do you not think this a very important question, not only to the profession, but also to the people and the state? Men's lives and liberties and fortunes are too sacred to be trifled with by those who are not fitted for the service.

The legislature should also be asked to wipe off the statute books many so-called laws, which, by reason of legislation on parallel lines or by judicial construction, have been obsolete for a longer time than some of you have lived. While the continuance of such alleged laws within the lids of the statute books may not be misleading to the able practitioner, it is very much so to the younger members of the bar and to the unprofessional farmer and business man, and they should not be misled by that which can be so easily remedied. It is one of our public duties to see that it is remedied, or that some intelligent reason be given why it is not.

The legislature should also be asked to provide courts in sufficient number so that every person can have a fair, intelligent and impartial hearing in respect of his controversy with his neighbor, and, if necessary, the consent of the people should be obtained so that a legal enactment to that end may be made. The same number of courts that was sufficient for the wants of 500,000 people are entirely inadequate for a population of two and a half or three millions of people, and it is quite as illogical to insist that they are as it would be to insist that the same quality of food and clothing and shelter that would be sufficient for the one would do for the larger number. At one time, when we had a much smaller population than now, and when the number of cases upon the calendar of the supreme court was small, there were four judges to hear them. Usually they had an abundance of time in which to hear them, and the opinions which they wrote and published to the world gave Michigan a greater reputation, not only in a legal sense, but in every other, than has been given to it through any other, and, I might say, all other channels that the state has employed to gain the good opinion of other countries. The judges won renown and the state honor.

Now, with a large and increasing population, we find from 200 to 300 cases upon a term calendar of the supreme court, besides a large number of motions and non-calendar cases, and with only five judges to hear and pass upon all the questions involved in them. That this vast amount of work cannot be done by five judges, no matter how great their ability or how assiduously they work, goes without saying. To insist that they shall do it will be productive of much injustice to them, to litigants, and to the state. To my own personal knowledge they are working to the fullest extent of their strength and ability for from twelve to eighteen hours out of every twenty-four. The time will quickly come when they must do less, for human nature is not strong enough to endure such a strain upon it for any great length of time.

What the relief shall be, and what means shall be adopted to obtain it, is a subject in which not only every lawyer but every citizen has a profound interest, and it is one of the subjects that this association should not lose sight of in its future consultations. Speedy, impartial and intelligent judgment by the courts upon the contentions of the citizens is exceedingly desirable. The fact that the people are willing that their rights

shall be settled by the law shows their advance in civilization, and the judgment of a law court is a marked evolution from the logic of the sword and gun and armed retainers and warlike defenses, by force of which our ancestors, not so many centuries ago, preserved their lives and liberty and inheritance of lands and goods. It is a system that has come to us out of much contention and after many struggles and sacrifices. It is therefore peculiarly appropriate that those who are most learned in its history, and who are brought more ready to see its benign influence upon society and state should be most deeply interested in perfecting it and making it commensurate with the needs and demands of those whom the courts are to protect.

The matters referred to are only few of many which demand the immediate, united and earnest attention of the lawyers of this state. It is a duty we owe to ourselves, to the public and to the practice of a profession that has been dignified by the many illustrious names which have adorned it from the beginning. It is to be hoped that our united action will produce a decided improvement in the practice of the law, in the public administration of it, and in the promulgation of those sound legal principles which underlie our system of government. If such a result is obtained we may all point with pride to the humble part we have taken in behalf of the general public interests as against the private schemes which are so persistently crowded to the front, and which are not always of benefit to the general public.

REVISION OF THE CONSTITUTION.

THOMAS E. BARKWORTH.

About a year ago the bar of the state was somewhat startled by the argument of one of its eminent members in a case before our supreme court attracting national attention, that the doctrine of constitutional growth and development was properly applicable by courts in their decisions of cases arising under written constitutions. That the courts should recognize as a basis of interpretation changing conditions and make the provisions of the instrument fit the environment, was a proposed innovation which attracted the attention of political scientists and lawyers alike. It may be conceded that the instances cited where decisions of courts of last resort seem to recognize some such principle were pertinent and that the argument as a whole, was, as might have been expected, one of strength and power. That constitutions are not absolutely rigid is an undeniable assertion. Its truth is recognized by the provisions contained within every written constitution of which I have any knowledge, for changing the instrument to accord with the differing conditions met in its continued operation, but the providing of the specific methods of change imply the exclusion of that by construction, and it would seem to follow logically that action by the court or legislature, either in changing or ignoring any of its provisions must rest upon assumed rather than real power. The dangers attending such assumption of power are greater than immediate results would indicate. We are suffering in our political and social systems from a prevalent disrespect for law, and it may well be asked, if a paramount law is disregarded by those who exercise law-making and law-construing powers under it, what right have we to expect from the citizens any greater virtue regarding the law thus created or construed? But ample provision exists to meet the emergencies which time may present without doing violence to any principle of construction.

I shall assume so far as the purposes of this paper are concerned that no such power of extending the terms of a written constitution either by courts or legislatures exists, but these bodies are amenable at all times to the letter of the constitution interpreted under the ordinary rules of construction. This seems to be the theory of our own constitution, for not only do we find a provision for amendment, but the further provision that every sixteen years the question shall be squarely presented to the people, whether or not the entire instrument should be revised and made to accord with the changed conditions naturally to be expected. At the time of the adoption of the present constitution in 1850, Michigan contained a population of 400,000, less than one-fifth of its population in 1890, while its total vote had increased from 65,000 in 1848, to more than 475,000 in 1888. The present instrument has proven unusually satisfactory to the people of the state. Two attempts, one by the convention of 1867, and the other by the commission of 1873, to supplant it by new productions have been rejected by the people, and to-day it may fairly be conceded that the conservative sentiment of the state would not sustain an effort at radical

change. But this does not preclude an examination of its provisions for the purpose of ascertaining whether or not a revision of the instrument on conservative lines is not an advisable thing.

While not intending within the limits of this paper to philosophize very deeply upon the principles underlying constitutional government, it appears to me plain that practical results are not the only things which should govern us in the consideration of this question. The people are watchful of the source of governing power and are keenly alive to any evasion or disregard of its provisions by the authorities using its powers. If, then, by its terms the constitution either permits or compels the abandonment, ignoring or evasion of its safeguards by any of the departments of the government, the entire structure is thereby weakened. A determination which can only be justified by the people upon the theory of final and absolute power exercises a demoralizing influence upon the body politic.

An experience of two terms in the legislature has convinced me that some revision is necessary in the provisions of the constitution governing that body. I am further of the opinion that the particular provisions of the constitution in which change is desired or the precise extent of change are not easily determined in the hurried and necessarily imperfect examination which is permitted during the continuance of the legislative session, and that in any event some body other than the legislature itself will have to originate the reforms.

In addressing myself to an examination of the present constitution governing the legislature I shall suggest such thoughts thereon as are born of my own experience.

First. As to the membership of the two houses. Without any intention to depreciate the comparative ability of recent legislatures, it may be truthfully said that less than one-fourth of the members of either house compose its practical working force, and that upon the whole the deliberative possibilities of the assembly are not equal to the work in hand. How, then, could improvement be had? One answer is obvious: By securing better membership. But attainment of this result does not seem, under our present system, easy of accomplishment. It may be that increase of salary might tempt better men, but this is by no means certain. The salary might be multiplied to many times its present proportions and still not compete with the ordinary channels of business in securing men of ability. Another expedient suggested is decreasing the number of members and thus increasing the importance of the office and its consequent honorable character. There might be a difference of opinion as to the effectiveness of either plan, but it is not my purpose to attempt to settle vexed questions, but to suggest their existence and the necessity for some solution. Although personally in favor of the second body, I do not believe that the different territorial representation of its members is alone productive of so much benefit as would result from a longer term of office, or the possibly better expedient of electing senators by classes, as in the United States senate. Certainly some change is needed in the present plan of apportionment of the state into representative districts, as the increased population in the state practically makes a constitutional apportionment impossible, and approximate expedients in such matters are manifestly undesirable.

The extra compensation to members from the upper peninsula has been productive of much, to my mind, serious trouble during each session

of the legislature at which I attended as a member. There is no longer any good reason for distinction, and the discretion given the legislature with respect to this matter is made the basis of much demoralizing lobbying. I do not think it will be questioned that some change should be made in the general compensation of members. What this should be, and whether by increased per diem or by making the salary attach to the term, regardless of the time of service, are matters for discussion about which I express no opinion.

The provisions regarding the passage of bills should be made to accord with modern ideas and practices, and should be such as could be strictly adhered to. Evasions of constitutional provisions do not conduce to respect for laws, even on the part of those thus avoiding inconvenient restrictions.

The provision respecting the introduction of bills is the source of much delay in legislation. The time should be shortened or the provision entirely abolished, and some more convenient plan adopted.

The provision respecting the publication of laws by newspapers is no longer of moment or practicable and ought to be abolished.

The provision respecting the incorporation of cities and villages certainly needs revision. The precise method of affecting the requirements of modern civilization in this respect is not easy to determine. It will be noticed that the legislature at the session just closed provided for the appointment of a commission by the governor to draft and recommend a general law governing this subject, but it would seem as if no such law could be made effective without constitutional change, limiting the power of the legislature. The difficulties of the situation are apparent and inasmuch as a large portion of our population is now urban, the importance of carefully considered provisions on this subject cannot be over estimated.

Before leaving the article relative to the legislature it may be well to call attention to one or two matters, of minor importance perhaps; but, nevertheless, in line with the principles enunciated. The provision relative to the right of members to have the action of either house made of record as well as those respecting petition and protest might well be abandoned or so amended as to furnish some remedy against their non-allowance. The anomalous expedient of permitting an interested party to be the sole judge of the application of these provisions practically nullifies them, as in the only cases where they are of any real value they are by force of circumstances denied. If they are of sufficient importance to retain in the instrument, the rights should be guarded by some provision which would insure their concession in proper cases.

The executive department demands much less attention, ample power being given to the executive, while the settled construction of the constitution furnishes the legislature and judiciary with sufficient check against its abuse. The grant of exclusive power with respect to pardon, reprieves and commutation might, however, well be considered in connection with the growing sentiment in favor of some national change in the method of inflicting penalties for crimes. Whether the courts by some system of indeterminate sentence, not now permitted by the constitution, or the executive by some enlargement or modification of the power of commutation should be entrusted with this power to modify the existing system is a proper question for discussion and deliberation in connection with constitutional provisions.

The judicial department has been for some time attracting the atten-

tion of our citizens, and various ideas are found among the people as to the best method of obtaining relief from the apparent defects in the present system. The temporary relief already furnished by existing legislation under the present constitution will not much longer suffice. Within a few years at most radical changes must needs be made, and thought and discussion upon this subject need to be stimulated in order that the best method may ultimately be reached.

The power granted to the legislature by the constitution to establish courts of conciliation needs to be defined and their jurisdiction in some way made applicable to present conditions. Questions may at any time arise between vast corporate enterprises, which now for the most part carry on the industries of the country, and the workmen in their employ, where some sufficient tribunal should be within instant reach for the settlement of disputes between them. The constitution should contain some positive provisions as to the extent to which ordinary judicial power might be entrusted to these tribunals, and under what conditions their aid might be invoked.

The legislature which adjourned last week enacted a law intended to give limited suffrage to females. Serious question has been made as to its efficacy, and it would seem that the constitution should be in some way changed so as to admit of such extension as the passage of this law indicates that popular sentiment demands.

The board of state auditors has, under various statutory enactments, been made a court of claims for the decision of controverted matters in which the position of the state is that of an ordinary party litigant. An examination of some of the claims submitted to that body by recent legislatures, particularly the last one, will demonstrate the necessity of some constitutional limitations and safeguards, or danger exists that the legislative halls will ere long be crowded with lobbyists, pressing all sorts of claims against the state government to the depletion of its treasury. The liabilities of the state for consequential damages arising out of the negligence of its agents and officers was repeatedly recognized and in spite of the constitutional provision against the auditing of claims by the legislature, a maximum limit is fixed, which before a tribunal whose proceedings are wholly *ex parte* usually proves a practical adjustment of the amount of the claim.

The provisions of article fifteen relative to the formation of corporations are practically evaded at every session of the legislature, and classes of corporations which are merely designed to give life to specific organizations with branches are becoming almost as numerous as are municipal corporations which apply for special charters. Every secret order has its special law, and private capital engaged in special lines of work, by adopting some of the features of the system used for the organization of fraternal societies, is placing itself in the line of special dispensation until the spirit of the restriction has been practically ignored. The almost infinite variety of industrial enterprises are pressing their special requirements in like manner. Action is here imperatively necessary. Judge Cooley recently called attention to the provision of the constitution relative to the enactment of banking laws, citing the statute of 1887, which attempts to provide for the enactment of amendatory statutes without the intervention of the people, as of doubtful constitutionality. While the learned gentleman does not cite the language of the constitution as it at present exists, nor apply its strictures directly thereto, it would seem that

the provision, that no banking law shall have effect until the same shall, after its passage, be submitted to a vote of the electors of the state at a general election, and be approved by a majority of votes cast thereon at such election, is contravened by the enactment without such intervention of changes and modifications of the law thus submitted. This is done, however, at each succeeding legislature, thereby rendering entirely useless the submission provided for by the above clause.

Pending litigation of great importance suggests that provisions of the constitution relative to the term of existence of corporations might very well be coupled with some provisions relative to holding valuable franchises by such corporations. Personally, I believe that the provision giving to the legislature power to extend the life of corporations should be subject to additional restriction. The last legislature was subjected to considerable pressure to secure the passage of a law to indiscriminately lengthen the term of every corporation except those specifically excluded from the operation of this provision by the constitution itself, and fears may be well entertained by those cognizant of legislative methods that the discretion interposed by the constitution is of less moment than might at first be supposed.

The condemnation of lands for public purposes may have been originally sufficiently guarded by the constitutional provision, but it is manifest now that either the constitution should be changed by extending the power of condemnation to purposes which are only remotely connected with the public need, or else that some restriction should be placed upon the use of the oftentimes imaginary public interest.

Under the present drain law, for instance, private property is often taken and burdens imposed where the public interest is the merest fiction. Within my own city is the terminus of a so-called railroad (the right of way of which was in part secured by condemnation) which extends from a private manufacturing plant to some clay pits a few miles distant, whence the supply of clay is drawn by a diminutive locomotive in equally diminutive cars, over a track two feet in width, for the purposes of the manufacturing plant aforesaid.

It is not at all essential that discussion should be had as to the various ideas which might impel the members of a constitutional convention, nor that the dangers of experiments in that direction should be enlarged upon. Until there is imperative need to resort to other fundamental principles than those now incorporated in our constitution, it would be well to avoid the costly errors of other states. The application of new theories to the construction of constitutions should be studiously avoided except in response to emphatic public demand, which certainly does not exist in our state. The general plan of our present constitution has been in no way detrimental to the development of the state. Recent changes in the attitude of the people with regard to amendments manifest the recognition of some deficiencies in that instrument, and, to my mind, also manifest the desirability of some systematic changes at the hands of some body specially selected for that purpose. Of the four amendments adopted by the people at the general election this spring, but one was the product of ordinary legislative deliberation—that with respect to the salaries of state officers. This is scarcely defensible when critically examined, and its passage, in view of the action of the people in previous years upon the same question, indicates that something like systematic amendment would be favorably received by the people, if not prescribed on rad-

ical lines. The action of the people upon the question of revision, submitted at the general election in 1892, is also another indication that need is felt of some change, but the smallness of the vote would further indicate that the people are not all actively aroused in opposition to our present form of government.

The mooted question as to the effect of the popular vote upon the proposition was settled by the legislature by ignoring the bill providing for the election of a constitutional convention, thus *prima facie* determining that the proposition was not constitutionally adopted by the people. Whether this is a correct decision is only a matter of curious speculation as the action of the legislature seems to meet the acquiescence of the people. I must confess that my own views as to the desirability of such a convention have undergone a change and that I now believe the interests of the people will be subserved by this action of the legislature. A convention would be likely to entail heavy expenses upon the already overburdened people, while it is doubtful if radical influences would not secure incorporation into the proposed revised instrument, and thus secure its rejection by the popular vote. A commission appointed for the purpose which would, without much expense, submit well considered and necessary amendments to the legislature would, in my opinion, be productive of the best results. The pressure of business upon legislative committees is such under existing circumstances as to preclude careful consideration of proposed measures which should be given to changes to be made in the constitution. So great is the pressure for the attainment of private interests that the more important interests which affect the public at large are relegated to the back ground, and the measures securing preference in consideration, outside of those purely political, are usually those the passage of which is aided by the most efficient lobby, either within or without the legislative body. This lobbying whether by members or by the third house is seldom inspired by any regard for the public interests, or carried on upon the basis of intelligent consideration of the best interests of the community. It must be confessed by one familiar with the present legislative methods that legislative dickering is more potent than the merits of a proposed measure. The temptation and opportunity for this abuse should be lessened as far as practicable; and I believe that the subjects to which attention has been called bear an important relation to this subject, and that the public interest is concerned in some change to be secured by modification of the present constitution.

MICHIGAN SHOULD ADOPT A CODE OF CIVIL PROCEDURE.

ELI R. SUTTON.

The question of codification may be considered in the abstract or concretely. The advantages of codification as a general proposition I think all of us would be willing to concede, but the expediency, or practicability of codification in a particular locality, may depend upon conditions. That the question considered in the abstract is not only practicable but expedient, can be demonstrated with mathematical certainty. Even Mr. Alfred Russell, in his annual address before the American Bar Association in 1891, expressly announced himself as a believer in codification in general. "Should Michigan adopt a code of civil procedure?" puts the question concretely. It becomes practical. Metaphysical discussions of questions in the abstract are, in my mind, void of effect, but discussion of questions with reference to time and place always produces results. Practically the question of codification is always particular, like other systems of government or administration, for no people will interest themselves in what, for them, has no value. The form of the question further limits us to a code of civil procedure, shutting out altogether penal and political codes.

First then, is it practicable to codify the civil procedure of Michigan? All law, I take it, is either statutory or judicial. None deny that it is perfectly practicable to re-express and arrange statute law, nor will any deny that it is just as practicable to extract from cases the *rationes decidendi*, and state them more or less systematically afterwards. The practicability of this question can be better demonstrated by example. Our answer to the dogma that we cannot codify laws is that we *have* done so. The code of Justinian certainly is worth some consideration as a precedent. Not unlike the common law, the customs of the Romans grew up. Supplemental and amendatory statutes, in the form of imperial constitutions and decrees, swelled and complicated these laws, until they approached the condition of the common law to-day. The genius of Justinian impelled him to undertake what was more of an experiment than now, a complete and general codification of all the laws, decrees and constitutions of Rome,

To-day the institutions of continental Europe, South and Central America, Japan, two of the Canadian provinces, and our own state of Louisiana, besides a greater portion of all the islands in the South and Central Seas, prove the wisdom and genius of the experiment. Carlisle says that "Dante spoke for the silent centuries." Justinian was greater, for he not only voiced the customs of the past, but his words embodied those customs in such form that new states to this day have shaped their policy and moulded their institutions after lines he laid out. Had the laws of Rome never been promulgated in codified form, or promulgated in a less efficient form, I thoroughly believe that they would have been forgotten with the songs that the Romans sung. For those who want a nearer precedent, it may be stated that England herself, the mother of the common law, has a practice code. If these are not yet sufficient, then the example of twenty-

six states in our country should settle the question beyond all doubt, especially when it is known that not one of those states has ever shown any serious disposition of returning to the old system. Never in the history of jurisprudence, has a code once established been abrogated. This, though a general proposition, I believe, is correct. Strange it seems that in this country, where we have codified with dangerous rigidity the only body of laws which apply to the whole people, and bow before our written constitution with almost superstitious reverence, we should hesitate to reduce to written form our other laws, laws which affect us as citizens much more vitally! Our constitution is nothing more nor less than a code. Prof. Pomeroy says in the introduction to his work on constitutional law: "It is, indeed, in all respects a statute,—a statute of vast and solemn import, enacted in the name of the people, and accepted by them as the basis of all other legislation, and therefore infinitely transcending all in importance and compulsive force; but it is none the less a statute,—an expression of legislative will in a written form. * * * In short, the constitution is a written code creating functions perfect as far as they go."

Within the compass of our written constitution is contained all the machinery of federal government, and "he who runs may read." The British constitution has no existence outside innumerable reports, and centuries of history between that instrument and our own a difference is seen in their effects upon the historical development of the countries. In England the constitution is the direct outgrowth of English history, while American history is determined largely by the constitution. One is largely the effect, the other largely the cause. I maintain that a knowledge of the British constitution cannot be acquired without previous knowledge of British affairs from the beginning. Not so with us, for instead of considering as evidence all possible theories and precedents, we have made *one* rule, clearly stated, the law. The constitution of the United States contains much more than the British constitution, but it may be committed to memory by the American schoolboy.

Considering these arguments conclusive as to the *practicability* of codification, we will next take up what naturally follows, the expediency of the undertaking.

Codification has to do entirely with the technical side of law, which Austin affirms to be "incomparably more difficult than what may be styled the ethical." In other words, it is far easier to conceive justly what would be useful law, than to construct that same law so that it may accomplish the design of the law-giver. Under *expediency* then we should first consider the ability of those who might be called upon to accomplish the reform. The confidence with which Michigan reports are referred to in other jurisdictions, the general reputation of our bar at home and elsewhere, the frequency with which the names of Michigan lawyers appear on the United States supreme court calendar, attest the excellence and high standing of our state bar. Lawyers, many of them, we have whose names are honored wherever ability and culture are respected. The state that can produce such gentlemen as Judge Cooley, Justice Brown, the Hon. Benton Hanchett, or none the less, Mr. Alfred Russell himself, all members of this Association, and others I might name, is surely able to reform the procedure of her courts, especially at a time when even the uninitiated can see the need of reform. The governor of this state could call to the task lawyers superior even to Trebonian, or Ulpian, or Paul. Michigan is then competent to codify her legal procedure.

If codification is practicable, and we prove our ability to do the work, the next and final step will be to inquire whether or not such reform would prove advantageous; if so, it is, without more ado, our duty to undertake the work of codification. No one for a moment would assert that progress in any line can come about except by reform. Progress and reform cannot be divorced. Checking reform hinders progress. Running water is clear, but standing water ferments. The common law has been standing still, or moving along so imperceptibly slow that it has reached the fermenting stage. It daily becomes more complicated and technical. Every legislature that convenes promulgates statutes which are nothing more or less than attempts to harmonize social conditions with existing laws. Civilization marches forward with rapid strides while law moves slowly. By this higher civilization new needs are created which existing law is unable to supply. Friction results, and law, instead of a help, becomes a burden.

In January of the present year Lyman Trumbull, president of the Illinois State Bar Association, in his annual address had in mind the same thought when he said: "In all the sciences, save that of law, great progress has been made within the last few centuries." Hence the efforts of the legislature to purge away parts which society has outgrown by enacting statutes—statutes which have aggregated thousands of volumes, solemn monuments of a mangled and worn-out body of laws which all these altering and amendatory acts have in vain attempted to resuscitate: Instead of waiting for a wrong to die its natural death, why not wipe it out the moment its burden is felt? Possibly, in course of time, by the process of evolution, all wrongs will disappear; that, of its own motion, law will become simple and just; but who of us are willing to wait until the millenium comes? Evolution might have freed America from Britain, or the slave from his master, but we to-day, instead of American citizens and citizens of the sovereign state of Michigan, in all probability would have been provincials, like our short-sighted Canadian friends, and the slaves still be sweating under the lash. Revolution is the sensible way of redressing great evils. Revolution is not only the better but the only way of coping with such evils as adhere to systems like the common law, evils which in time become of the very essence of the system itself; for in the words of Benham, the "common law embalms errors as easily as truths." Even Lord Mansfield declared some of the rules of the common law to be absurd. Violent must be the means employed to purge such a system. Now, I ask with Austin, in all candor, which is most likely to be bulky and inconsistent—a system of rules formed together, and made on a comprehensive survey of the whole field of law, or a congeries of decisions made one at a time, and in the hurry of judicial business? Repetition and inconsistency are the natural fruits of the methods we employ. Rules thus made, one at a time, may be extricated from the decisions; if so, it is possible to extract from all decided cases the principles upon which the decisions turned, and to formulate them into abstract general law, which is, to the confused mass, what the finished statute is to the massive marble; a *priori* statute law so arranged and formulated would be preferable to our plan of coining statutes singly and without thought of the whole, excepting the particular wrong the statute attempts to remedy.

Because the Linnean code brings the facts of botany within the grasp of the student,—because the mind of man is so constituted that it can

never learn law or anything else by committing isolated facts, and because the code will systemize a technical and absurd body of laws which we have outgrown, I am in favor of codification. Yes, men have acquired a knowledge of law, but how? By individual codification. To this same idea Holland devotes the second paragraph of his well known work on jurisprudence:—"The ever renewed complexity of human relations calls for an increasing complexity of legal detail till a merely empirical knowledge of law become impossible. The evil has been partially remedied by the formation of codes, by means of which legislators, more or less imbued with legal principles, have grouped the legal chaos under genera and species. But an uncoded system of law can be mastered only by the student whose scientific equipment enables him to cut a path for himself through the tangled growth of enactment and precedent, and so to codify for his own purposes. In this, as in other departments of knowledge, the difficulty of the subject is due less to the multiplicity of its details than to the absence of general principles under which those details may be grouped. In other words, while legal science is capable of being intelligently learnt, isolated legal facts are only capable of being committed to memory."

Let us then think seriously of this matter; let us do that which will elevate the bar in the minds of the laity, who justly avoid courts because they find them uncertain and expensive; let us meet the demands of the nineteenth century civilization and not longer parade, like Don Quixote, in a legal fabric manufactured in feudal ages, but cast off all this ridiculous trumpery, and don the garb of this enlightened day. Let us codify the laws of Michigan, and particularly let us adopt in Michigan a code of civil procedure.

I have received the following letter from one of the most eminent advocates of the code in the country and one who is especially qualified to speak:

HELENA, Ark., June 2, 1893.

DEAR SIR:—

My introduction to what is commonly called a "code of procedure," as contra-distinguished from the common law procedure, was under, what I thought at the time, peculiarly trying circumstances. It was adopted in July. With proper saving as to pending business, the act of adoption provided that, until the following January, either form of proceeding might be practiced, but after that date all proceedings must conform to the new code.

Prior to this time Arkansas had adhered as closely to the old practice as any state in the Union. Little effort was made by the legislature to cut off any of the fictions and encumbrances of the old-style procedure. Section 50 of the chapter on "practice at law" did provide that "no essoin or wager of law shall be allowed." But this only serves to illustrate the caution with which they used the pruning hook.

I was at the time circuit judge, and the lawyers of my circuit were almost to a man opposed to the change. Confusion and general shipwreck were confidently predicted for the time when we should be compelled to conform to the "code." It was pretty well settled by the bar that the first of January would witness the end of the world, so far as lawyers and litigants were concerned. Authorities without number were collated to show how often the conservatism of the law and the lawyers had saved civilization from collapse. What little knowledge I possessed

of law and law procedure was entirely confined to the straitest sect of the old school, and I found myself in hearty sympathy with the most pessimistic views of the new departure. I was glad to be enrolled in the front rank of those who were steadfast in allegiance to the ancient bulwarks which had been the sure anchor of all enlightenment, although I now confess that a close analysis of my case would have disclosed the fact that my boasted non-conservatism consisted chiefly in my ignorance of the new scheme and doubt of my ability to surmount this obstacle.

It was in this frame of mind that I opened the "code" and at the very first section read these words: "The forms of all actions and suits, heretofore existing, are abolished, and hereafter there shall be but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs; which shall be called a civil action." Here in five lines was a complete wiping out of the accumulated wisdom of ages. Where now was the whole family of "cases," of trover, detinue, replevin, and all the other illustrious personages who had their beginning beyond the running of the memory of man, including ejectment with its attendant high court functionaries, John Doe, Richard Roe and Ex dem Jackson?

It was perhaps weeks before I had sufficiently recovered from this shock to read further and learn that the pleader was restricted to his complaint, demurrer and reply, with a special provision for a cross action. Nor was this all. I learned that no variance between the allegations of the pleadings and proof were to be deemed material, unless it misled the adversary to his prejudice, and that upon the merits of his side of the case, in which event the court could direct the facts to be found according to the evidence, and allow amendments, at once, to conform to the facts, and without cost, and the court at any time, in furtherance of justice, and on just terms might amend any pleading or proceeding by adding or striking out parties or by inserting allegations material to the cases, before proof is taken, or developed by it in the progress of the trial; and must at every stage of the action, disregard any error or defect in the proceeding not affecting the substantial rights of the parties; and no judgment to be reversed or affected by reason of such defect or error.

I have sufficiently indicated the stupendous revolution which, as presiding officer of the court, I was required to head on the coming first of the year. If the legislature was correct in assuming that from July to January was sufficient time for the ordinary lawyer to adjust himself to the new order of creation, they overestimated the abilities of at least one judge, for at that time I am constrained to say I was not very much nearer the desired end than when the act was passed. The first term under the code was spent chiefly in blundering and undoing, and among the lawyers in devising pressure to be brought upon the next legislature for the repeal of the odious act.

In some way the impression had gone out among the laity that the code was an assault on the citadel of the profession, where they had intrenched themselves behind such subtleties and intricacies, as to be beyond the reach of ordinary humanity, and by the new departure were to be forced out of their intrenchments and compelled to disclose to the public the mysteries of their craft. In short that the practice of the law was to be so simplified that any body could understand why he had won, or was beaten in a law suit. With this idea prevalent in the minds of the people who returned legislators, I had not much faith in the scheme of repeal, and

decided, if I was to remain in the profession, it was time I set myself seriously to the task of ascertaining what this thing called the "code" was really intended for. It has always remained to me a matter of surprise, how the pages of the code were changed when I applied myself seriously to their study, dismissing as far as possible my former prejudices, and conceding to its projectors a fair degree of intelligence and a desire to redress real or fancied grievances.

Code advocates may have no fears for ultimate success if they can induce, to the consideration of the subject, that degree of candor which necessity finally forced me to give it, followed by a reasonable degree of experience in its practical application in court. It may be conceded that under any system of procedure, justice is the ultimate object sought. The splendid results attained under the old system admonishes the iconoclast to pause and consider well before laying destructive hands upon it. The chief complaint against it is, that is so encumbered with a net work of technical rules, many of which have entirely outlived their usefulness, as to bring upon it the justly odious complaint of delay, while a searcher of the reports will be struck with the number of cases lost to deserving suitors through the meshes of artificial rules of pleading.

If the new system is to survive, and finally supplant the old, it must be because the bench and bar steadily adhere to that cardinal doctrine upon which, in my opinion, the whole fabric rests, namely: At every stage of the action, errors and defects, not affecting substantial rights, are to be disregarded, and no rule, however venerable, allowed to thwart the manifest rights of litigants.

With such a duty devolving upon them it may be assumed that court and lawyers will become more concerned to know what is right in the case at bar than in determining what the ages have said and done under similar circumstances; and technical and immaterial errors sink into insignificance when it is understood that as soon as pointed out they can be immediately remedied. My observation leads me to the belief that better judges and better lawyers are the result of this mode of procedure, as the time devoted to the consideration of technical and arbitrary rules the old is better employed in considering how justice may be done, regardless of the advantages to be gained by special pleading.

MARSHALL L. STEVENSON.

MICHIGAN SHOULD NOT ADOPT A CODE OF PROCEDURE.

ALFRED RUSSELL.

I will first consider the practicability of adopting such a code; and, next, the expediency of doing so. Thirdly, I will look briefly at the experience of some of our sister states with such codes; and, lastly, will suggest three desirable reforms in our procedure.

1. The method of law reform in use in Michigan for half a century has been, to remedy apparent defects by single statutes as occasion has arisen, and to continue this process indefinitely. Such statutes can be considered independently and therefore intelligently. It has been thought that to make a wholesale revision would be to encounter the danger of introducing new defects, and that delegating to commissioners the creation of a code would be to substitute their discretion for that of the representatives of the people. So deeply had these ideas impressed themselves in this jurisdiction, that when our constitution was framed in 1850, the convention inserted three provisions which immediately confront us on taking up our subject. Art. IV, Sec. 20 declares that no law shall embrace more than one object which shall be expressed in its title; and Art. VI, Sec. 5 requires the supreme court to establish legal practice; and Art. XVIII, Sec. 15 ordains that no general revision of the laws shall ever be made, but that a suitable person may be appointed by the legislature to arrange the laws under appropriate heads and titles, without any alteration whatsoever.

It therefore appears that it is beyond the competency of our legislature to appoint commissioners to prepare a code of procedure according to their own notion of what are the proper rules for the administration of justice. It may be replied, that the constitution should be amended in this regard. The rejoinder is, that such an amendment in all probability, never could be obtained. It would be difficult to demonstrate the desirableness of any such amendment; and, if this could be shown, sufficient public interest in the matter could not be awakened to bring about a change. To illustrate these difficulties, it will be well to refer, historically, to the action and discussion heretofore had in our state. In 1836 the legislature appointed William A. Fletcher to prepare a code. He submitted a report greatly changing existing laws. His work was adopted but with considerable alteration. Thenceforward, until 1844, successive legislatures were busy in making amendments. Much dissatisfaction resulted, and in that year, Sanford M. Green was selected to prepare a new and complete code. His production, after numerous changes, was enacted into law in 1846, taking the place of previous laws. Four years later in the debates of the constitutional convention, discussion was had fully upon codification, both of the whole unwritten law, and of procedure, and other titles. The prevailing argument against codification of any sort, was, that laws should never be made or changed save by persons elected to the legislature. It was claimed, as re-stated by James V. Campbell, that the ac-

tion of the legislature "could not be, and had not been applied with full intelligence, to extended schemes which reflected the minds of others, and could not, on their passage, be thoroughly compared and digested by the body of legislators, so as to enable them to realize their full effect on the whole legal system of the state." The convention ordained that the legislature should "be protected against the danger of the substitution of the judgment of others for their own."

In 1873 the legislature, by joint resolution, 1 Sess. L. 1873, p. 571, required the governor to appoint two commissioners to prepare a code of procedure, similar to that of New York, abolishing common law forms of action and pleadings, and the distinction between legal and equitable remedies. The attorney general rendered a written opinion that the measure was unconstitutional, and the governor declined to act.

2. But if there were no constitutional objection, and it were practicable to adopt a code of procedure, let us inquire whether it would be expedient to do so, in view of the nature of our existing procedure. In my judgment our existing practice is so convenient, and free from technicality, that there is no call for any new code of procedure. We have a ready, simple and effective method of applying remedies where rights exist. This is the sole object of what is termed "procedure." It concerns the statement of the facts, the ascertainment of the facts, and the determination of the law respecting them. The statement of the facts is what is called pleading. On the law side we use a declaration setting forth the plaintiff's claim. Our supreme court has adjudged that "the omission of the verbiage common in the precedents cannot make a declaration bad which sets forth a substantial cause of action." We have, to be sure, different forms of action. But the truth is, and it is impossible to evade it, that the distinction between forms of action, as we use them, exists in the nature of things. Actions of contract, and their subdivisions, differ from actions of tort and their subdivisions; and all these differ from replevin. How is code pleading in this regard any better? Take the Connecticut code as an example. It provides for a simple form, called "a civil action," but it divides the claims which may be set forth in this action into seven classes. One form, with seven divisions, is substantially the same, and no better than seven forms. Besides, it is held in the code states that the plaintiff's "statement of demand" must contain all the essential qualities of a declaration at common law, as distinguished from mere matter of technical form. This is necessarily so, and there is consequently no advantage in abandoning the precedents. All code pleading presupposes the common law, which controls the construction of terms and language and conditions of recovery.

With us, if the defendant desires to demur, he files a simple statement that the declaration is not sufficient in law. If he controverts the facts he files merely a demand for a trial of them, and may add a notice, clothed in any intelligible words, showing his defense. Could anything be simpler? But no matter whether the notice is intelligible or not, there can be no demurrer, replication or other pleading on the part of the plaintiff. This is much simpler than the Connecticut code, which permits demurrers and replications to the plea, and still further pleadings. After the plea and notice, if any, our pleadings cease, and the facts are ascertained by a judge or jury, as the case may be, and the law is determined by the judge. Either party may testify of his own motion, or be called by the court. The appellate court may review the decision upon a simple

account in writing of the points disputed at the trial, and that court has power to call the parties or witnesses to testify orally.

So far as the written law is concerned, portions of titles XXIX to XL of our annotated statutes constitute a code of procedure, most of which has been in operation about fifty years, and has been construed in cases found in our ninety-two volumes of reports. How few amendments may have been thought necessary may be seen by consulting the third volume of the annotated statutes by Howell.

Now, in regard to the common law of procedure, outside the above statutes, we have a standing commission of learned lawyers, in full sympathy with the work of reform, and with complete powers of codification. This commission is no other than the supreme court of the state; and it is not necessary to submit the work to the legislature for adoption. By the constitution, Act VI, sec. 5, and paragraphs 6409 and 6623 of Howell, that bench of judges are required to establish, alter, codify and amend the practice in law and equity, in all cases not provided for by statute, with a view to effect, as far as practicable, the following objects, among others: The abolition of distinctions between law and equity; the abbreviation and simplifying of all proceedings; doing away with all unnecessary forms and technicalities in pleading and practice; and expediting the decision of causes. The court may review their prescribed regulations every two years, or oftener. Under this salutary power we have had given us a hundred rules or more, on each side of the court, and modifications are made at almost every term. It is quite competent for the judges to draw up a set of forms, to supersede our common law forms, just as the Connecticut judges have done under their code. If any lawyer conceives a particular reform of procedure necessary, or that a new set of forms are necessary, he has but to suggest it to this standing procedure commission, to secure careful and wise consideration and action. These judges, constantly engaged in administering justice, are better qualified to frame rules than commissioners selected from the bar, or legislators. Such modifications as are needed are in the direction of assimilating law to equity and not the opposite.

It is a very rare thing in Michigan that a cause is delayed, or lost, for want of proper pleading; and it need never happen. But it is said that all forms should be abolished, and that every suitor should be allowed to make complaint in his own way and without the necessity of study. This is a very "taking" proposition to the minds of laymen and some lawyers. It is, however, totally unsound. No successful scheme of "law made easy" has yet been invented. All experience has shown that forms are not only helpful but indispensable for the orderly and useful administration of justice. The power of accurate and clear statement without a form is possessed by very few. Nothing is more difficult than to take up the facts of a complicated case, separate the material from the immaterial, unfold the principles of law wrapped up in the facts, and determine the kind and measure of relief obtainable. This process must be gone through with before a concise and lucid statement can be made, as a pleading for the information of the court, without the aid of a precedent or form. Correct thinking must precede correct expression; and the evolution of the facts must precede the evolution of the law. The forms are known to the profession and the courts. There can be no dispute, or doubt, about their meaning, which is very rarely, or never, the case with what is called a code-pleading.

I have stated above the extreme simplicity of our Michigan pleading on the law side of the court. On the equity side the procedure is equally simple. A bill in equity consists of only two parts—the narrative of the facts and the prayer for the appropriate relief. The answer is merely a setting forth of the matters of defense, and may serve as a cross-bill. The trial is by the judge. The record may be sent up for substantially a new hearing. Nothing would be gained, in my opinion, by calling a chancery suit a civil action. It is conceded, on all hands, that the difference between a case for legal relief and a case for equitable relief exists in the nature of things. A civil action for equitable relief is nothing but a bill in chancery; and it is always an advantage to have things called by their proper names. It should be provided that where a suitor has brought his antagonist into court and finds he has mistaken his remedy, a declaration might be substituted for a bill, or *vice versa*, without the necessity of commencing anew. Bills of discovery have been done away with, and many other improvements gradually made.

A consideration of much importance against attempted fusion of law and equity procedure in any state is the fact that the natural distinction has been imbedded in the jurisprudence of the federal courts. The federal constitution, in creating and defining the judicial power of the general government, establishes the division between law and equity; and where a claim is an equitable one in its essential characteristics, and falls under some of the recognized heads of the equitable jurisdiction, whether the suit be begun in the federal court, or be removed there from the state court, it must proceed in the federal court according to the rules of equity procedure. The federal courts are the chief chancery tribunals of the country, and they exist in every state, and the state bar are called upon to practice in them, and to follow thither cases begun in the state courts and removed, in numerous instances where non-residents are parties, or the suit involves federal law. It would be a great misfortune if the bar of this state should gradually become uninstructed in the procedure of equity.

By the act of congress of 1872, state code practice at law must be followed in the federal courts; but changes made in code states, with respect to equitable remedies, cannot be followed in the federal courts. There is no probability whatever that the federal constitution will ever be altered in this regard. And so, for all time, we must have equity procedure. And, as we must have it in one set of courts, it is best to have it in all. Many of our states originally had no equity procedure, but the major part of those states have found it necessary to adopt that jurisdiction in its fullness, particularly the great states of Massachusetts and Pennsylvania. The new English "judicature acts" do not effect a consolidation of law and equity procedure. The chancery division still administers the principles of equity according to the equity procedure, and doubtless always will.

In my judgment, equity procedure, so far from having become antiquated, is now more useful than ever. The complex conditions of our modern civilization, creating a multiplication of issues in almost all great transactions, have rendered equity procedure of increasing value. Such issues are impossible to be determined with justice in legal proceedings. The usefulness of equity procedure, in accommodating itself to the demands of the progress of commerce, are well shown in the recent employment of the writ of mandatory injunction in the Ann Arbor railroad

strike cases, unhampered by a code definition. The protracted character of litigation in equity, the theme of English satirists, has disappeared with us. As soon as the issue is formed there may be a trial, on oral testimony, in open court, without voluminous proceedings in the master's office, by depositions.

3. What has been the experience of some of our sister states in the use of code-pleading and practice. I call a few prominent witnesses. The supreme court of the United States has often declared in its reported judicial opinions in cases coming up from code states, that "while in theory code-pleading is said to be conducive to economy, expedition and clearness, in practice it is found to destroy all certainty and simplicity, and to introduce on the record a wrangle in writing perplexing to the court, and delaying and impeding the administration of justice."

Charles O'Connor said, after the New York code of procedure had been in force twenty years: "The common practice is to tell your story to the court, precisely as your client tells it to you, and just as any old woman, in trouble for the first time, would narrate her grievances. A demurrer to any code pleading is a very dangerous step, because it is utterly impossible for the keenest investigator to determine in most cases, what any other reader than himself will understand to be the import of the pleading demurred to."

At a later period in New York, in 1884, James C. Carter, in his paper before the committee of the Bar Association of the City of New York appointed to oppose the "proposed codification of our common law," said, on page 84, respecting the New York code of civil procedure: "Since its enactment in 1848 more than six thousand reported decisions have been made of disputes concerning its meaning; and the unreported controversies and decisions have been vastly larger. It is safe, however, to say that it has involved an expenditure of time by lawyers, judges, and legislators, (for all of which the people have been made to pay), tenfold greater than that employed on the law of procedure during our whole previous history; and this too after making all just allowances for the increase, in recent times of business, population and wealth." Mr. Carter also says, that the New York code of procedure is generally acknowledged to be worse to-day than ever on account of the frequent botching of the legislature. The above mentioned paper by Mr. Carter and his address on the "Provinces of Written and Unwritten Law," before the Virginia Bar Association in 1889, are masterly discussions which deserve perusal by every lawyer.

Just two years ago to-day, A. W. Clancy, president of the Bar Association of New Mexico in his address before that body deprecated the adoption of the California or Colorado codes of procedure. He said: "A New Mexico lawyer having occasion to sue a debtor in Colorado, after about sixteen months of diligent pursuit of the defendant through the devious ways of Colorado code pleading, succeeded in getting him to his fourth amended answer, but not to a triable issue." He also said "that an enterprising California law printer, wishing to get orders in New Mexico, sent, as samples, copies of California records on appeal; and that these records showed a demurrer and amendment to every pleading in the cases, evidencing a degree of labor, uncertainty and vexation impossible under common law forms."

4. Lastly, let us see what reforms in our procedure are really necessary to remove the principal objections urged by business men to our

present procedure, those of delay and uncertainty. Our courts and law offices are gradually being abandoned as a means of settling controversies. Societies of business men form committees of arbitration for quick disposal of disputes. Many persons prefer to lose good claims instead of entrusting them to enforcement by the courts. The decline of legal business, almost everywhere, is a noticeable fact; and this decline will continue until public confidence in our tribunals is re-established. Instantaneous justice is impossible, but early justice is possible; and those reforms which I will suggest would make justice early. Yet I have no expectation that the suggestions will become realities in our day.

1. Abolish the right of review in any form of any case in the courts of the justices of the peace, except when a constitutional question is involved. These courts should be valuable chiefly as courts of conciliation. They should be the end of the law to the parties and the higher courts should be relieved from trifling controversies.

2. Abolish terms of court and notices of trial in the circuit courts and let the issues on declaration and plea, and bill and answer and replication stand for immediate trial in the order of time of formation. A single statute of three or four lines would accomplish these reforms.

3. Abolish trial by jury in civil cases and let the judge decide the facts, the same as he does now in equity, probate and personal liberty cases. This would require an amendment of the constitution Act VI, sec. 27. It is no wonder whatever that the modern business man hesitates to hazard even the plainest case before such tribunals as our juries. Persons of no individual responsibility, often ignorant and prejudiced, and always unaccustomed to weigh testimony or argument, are drawn by lot, and not elected or appointed. The inability of a jury to deal understandingly with testimony was the origin of much of the law of evidence, pleading and practice, which would become obsolete with the abolition of the jury. Any jurors who may chance to be intelligent are commonly either excused or challenged. Those who remain are forced upon the suitor as the disposers of his rights, although he may not know whence they come or whither they will go, and perhaps from their looks would not trust some of them with five dollars. These persons are commonly unwilling attendants on the court, anxious to get back to their occupations, if they have any. The trial may be so long that it is not possible for them to retain the testimony, and they take no notes. A single juror from stupidity or corruption, may destroy the labor of weeks or months. The instructions of the court are rarely understood and often produce little effect. If the trial does not fail from disagreement, it is quite likely to from misdirection or from erroneous rulings on evidence. The composite character of this tribunal is not reasonable, there being a permanent responsible judge who has the sole power to admit or reject evidence, but no power to weigh or decide upon it, this power being committed to an inexperienced, temporary and irresponsible body which immediately disappears. Strangely, although the judge may not weigh or decide upon the evidence, he has power to nullify the verdict as against the weight of the evidence or as excessive in amount. This power was given to the judge on account of the proclivity of juries to decide without or against evidence, that is, to dispose of the rights of parties on prejudice or caprice. This proclivity to decide without, or against, testimony, led to the enactment of the statute of frauds, making a writing indispensable to authorize certain findings. That was two hundred years ago and yet the institution still re-

mains; such is the blinding effect of mere habit. Our New England ancestors at one time discarded the institution wholly, and at another abolished the requirement of unanimity, and also ordained that when there was a disagreement the judge should at once decide.

The time has come to do away the enormous expense, delay and uncertainty of the jury trial, which now renders the administration of so-called justice very often nothing but a farce, when not a tragedy where the property and dearest hopes of the suitor are sacrificed to the idol of inveterate custom. The popular argument in favor of juries is that the common people should share in administering justice. But our judges are not aristocrats. They spring from the people just as much as jurors do. Most of them were poor young men, who have risen by their unaided efforts. In five-sixths of the states they are elected by the people and for short terms. They may wisely be entrusted with the decision of the facts in all controverted cases. When this shall be done we shall be nearer the attainment of cheap, early and certain justice than ever before.

I may add, that the abolition of the jury would be the longest possible step towards union of law and equity procedure; because, under the existing constitution, the plaintiff, in law cases, must proceed at law, for the reason that the defendant has a constitutional right to a jury. In 1887, however, our legislature went the wrong way, and gave a legislative right to trial by jury in equity cases, but the supreme court held this violative of the constitution.

SOME REFORMS IN THE SYSTEM OF JURY TRIAL.

JOHN A. EDGET.

Experience has but confirmed my admiration of the system of jury trial. It has proven in many ways the best yet devised for the trial of the issues of fact. It relieves the judge of the burden of disposing of the fact, and gives him more time for the hearing and decision of the law of the controversy. It substitutes, for the technical learning of one man, the broader experiences of a larger number of men, drawn from all the callings of life, and representing all the social and intellectual grades. It makes the people actual participants in the administration of justice, and educates the mass to understand, respect and personally to aid in the enforcement of the law of the land. It is the sure protection of the weak from the attack of the powerful; the defense, under all conditions, of the liberty of speech and of press, of property, and of person. I would no more consent to its abolition than I would to the destruction of representative government itself; and it is because of these virtues of the system that we should, so far as possible, correct its vices, and the criticisms I have to offer are not by way of attack, but in the direction of reform and betterment of its method.

Disagreements.—The greatest objection to the jury trial is that it results so frequently in disagreements and mis-trial, which in all cases are a misfortune, and in many a positive defeat of justice. Disagreement serves not only to subject the parties and the public to useless expense and the hardships of re-trial, but it serves to bring the whole system of trial into contempt by reason of its abortive results. This feature of jury disagreement springs in great part from the senseless requirement that the verdict shall be unanimous. This requirement originated with the system; has survived every change of the law, and is a standing example of the persistence with which the forms of trial have resisted time and progress. This requirement of unanimity in order to reach results is not expected in any other matter requiring decision. The people determine all the important questions of local, state or general government submitted to their judgment by bare majorities. Laws are adopted by all the legislative bodies by a majority vote, except where the organic law has otherwise required. The most eminent judges may be impeached and removed from their offices; the chief magistrate of the nation may be in like manner convicted of high crimes and misdemeanors, and removed from his office, without unanimous vote of the tribunal to which the case is submitted. The courts of last resort are universally accustomed to decide causes of the highest consequence by a majority of members, and to give full effect to their decisions, notwithstanding the dissent of the minority. Everywhere, except in jury trial, there is a recognition of the universal right and necessity of disposing of controversies, notwithstanding the dissent of a part of those entitled to pass upon the matters at issue. Such differences exist originally in the capacity of men, and have been created by different experiences and habits of thoughts, that we are not

liable to secure unanimity of opinion on any question, however simple, and rarely need expect it, where the issues are numerous or doubtful. Yet we insist, in jury trial, that the jury shall agree, whether or no, and proceed to coerce agreement by all the powers of the court. The jurors are secluded on the conclusion of the case, held in custody by the sheriff, and informed that they will not be released, except in the discretion of the trial judge, until they agree upon all the facts submitted to their decision. We have grown so habituated to see this done that it has ceased to strike us as ridiculous; and yet we instantly recognize it to be so, if applied, for instance, to the judges of the court. Let us assume, upon the submission of a chancery cause, to the five judges of the supreme court to find upon the issues of fact, it was declared by law that no decision should be made until all the judges should agree upon the matters in controversy, and that they should continue in deliberation until they so agreed, would not the absurdity be manifest? What is the inevitable result of such requirement upon the trial itself? In cases where the issue is close, and opinion honestly divided, some one of the triers must surrender his individual judgment, and such compromises will be required that the verdict, when finally rendered, may not embody the honest judgment of any man on the whole list of triers. All these illogical and unauthorized verdicts, which are rendered in disregard to any theory on which the cause has been prosecuted or defended, are legitimate and inevitable outcome of this attempt to cramp and coerce all the separate minds of the jury into the same channel, to make them think alike, and to honestly arrive at the same result. In my own experience upon the bench it has not been infrequent, after the conclusion of a trial, for individual jurors to declare to me that the verdict was not satisfactory to them and did not accord with their views of the proof, but nevertheless it was the best, in view of the differences of opinion, that could be obtained. The minority of the jury, or even a single member, if so disposed, is always vested with the power to either produce a mis-trial or to compel the acceptance of his views, in whole or in part, of the verdict.

The Remedy—The true remedy for this state of facts lies in a provision for the rendition of the verdict, by some vote less than the whole. To make a record for the information of the court it will be well for the rendition and entry of the majority verdict and also of the dissent thereto; and in the absence of the reasons to the contrary to enter up judgment upon the former.

Criminal causes—Should this method of arriving at a verdict apply in criminal causes? I answer the principle should most certainly apply. Indeed, the necessity for such a change is more apparent in criminal than in civil causes. It is rare that a criminal who merits conviction escapes by an acquittal. The ordinary history of such a case is a disagreement on the first trial. If the public is still inclined to prosecute, the fact of disagreement on the first trial permeates the second and the chances for disagreement are increased, and after a number of such trials with their incidental expenses and delay, the public prosecutor worn out with disagreements gives over the prosecution. Indeed, the jury system as now constituted is the effectual safeguard of the criminal, the cover under which he is constantly escaping conviction. It is a matter of common experience that two disagreements are treated as equivalent to an acquittal, and equally notorious that the ability of a large class of attorneys, practicing in court in the defense of criminals is displayed, not so much in the trial of the

cause as in judicious challenging whereby a jury is finally secured with one or more members upon it who in the nature of things can be relied upon to procure a disagreement and thereby defeat a verdict. It might be well in view of the results of the verdict upon life and liberty to require in the criminal cases a nearer approach to unanimity in the rendition of the verdict, but the general principle of reaching a decision, final in its character without requiring it to be unanimous should be common to all classes of causes. No danger of the conviction of innocent men need be apprehended from such a change. The cases are infinitesimal wherein ten men, if the concurrence of that number be required in a criminal case for conviction, will all unite in a verdict of guilty, in spite of the presumption of innocence, the burden of proof and the other safeguards which surround the respondent, unless guilt is proved and clear; and if such a case of unjust or unwarranted conviction should occur the trial judge may well be relied upon to set aside the verdict and to give the accused a second opportunity for trial.

Cost of the system:—The cost of its operation as compared with its results is extravagantly wasteful. From the most accurate estimates which I have been able to obtain the annual cost of the jury service in the counties of Wayne, Saginaw, Kent and the thirty-one circuits outside of those named approximate \$400,000 to \$500,000, while the cost to the state of the entire judicial system including the five members of the supreme court and the forty trial judges of the state amounts to but one-fourth of that expense. Indeed I have known of several of the smaller and newer of the circuits of the state where the expense of the jury, term in and term out, was equal to or exceeded the amounts involved in all the controversies disposed of by them. It is a matter of common observation that it costs the public more to pay the expenses of the jury in the trial of appeal causes than the aggregate amount of the verdicts rendered. In two appeal cases reached and tried last week in Saginaw circuit the amount of recovery was in the aggregate \$25, and the actual expense to the public in furnishing a jury to dispose of the controversies was four times that amount. These extreme cases furnish their own argument. The law which demands or concedes the right of parties to require a full panel of twelve men to sit on such cases at the public expense may be well characterized as an outrage upon the taxpayers. It must of course be conceded that public policy requires a speedy trial and final disposition of the controversies in the community, and that the facilities for trial should be furnished at public expense. But the expenses ought to bear some proportion to the character of the case, and if litigants who have but \$10 in difference between them will continue to insist upon having a jury try the matter, they should be required to pay the expense of the luxury, or the jury should be reduced to not more than six. Indeed, the reform most necessary in the interest of economy, could be accomplished by reducing the panel in every case to a number not exceeding nine, and in all cases of appeal to not exceeding six. Nothing but immemorial custom has created the notion of having twelve instead of nine or six. If the number of jurors fairly required to make up a panel could come up as an original question it would never be fixed at as high a number as twelve. Theoretically the more you divide responsibility by increasing the number upon whom it is imposed, the less each trier feels responsible for its result. It is possible for a court to be too unwieldy in numbers to accomplish good work, and it is equally possible that a jury of twelve may be too cumber-

some for the proper dispatch of the matter submitted to them; too numerous to feel a proper degree of personal responsibility for the verdict.

Independent of the question of economy involved I think that a reduction of the number of the jury within a reasonable limit would secure better results without in any way affecting the integrity of the system of trial itself.

CALIFORNIA SYSTEM OF CODES.

W. H. H. RUSSELL.

In complying with the request of the board of directors, to prepare and submit a paper, at this session of the association, upon the California system of codes, I am conscious of the fact that the subject comprehends one of the most important features of our present system of American jurisprudence, in that it may safely be asserted that the general trend of the public mind, and of professional and judicial opinion, is toward a unification and codification of the laws. In fact, under our present theory form and system of government by the people, a republic composed of sovereign and independent states, under written constitutions, it is remarkable and lamentable, that a complete system of codes has not been adopted in all the states, and a national code of the federal laws adopted by the general government.

Louisiana and California are the only states which have the code system entire. Louisiana, as early as 1824, adopted the Code Napoleon, and has ever since retained it with but few amendments. California, in 1872, adopted an entire system of codes, consisting of four volumes, namely, the political, civil, procedure and penal codes. It may therefore be of interest to legislators, laymen and the profession at large, to note in brief review, the history of codification, and the evolution of the law, from the first dawn of civilization to the present time.

Hebrew jurisprudence produced the first great law giver, who so condensed and codified the moral law in the incomparable and imperishable formula of the ten commandments, that even the wisest men of succeeding ages and generations have not presumed to question, deny or change.

If the moral law could thus be briefly expressed and codified in ten provisions, so that it has stood the test of centuries, why may not the civil law be reduced to fixed and declared principles? One of the happiest and brightest thinkers of modern times, as an author, in his "Beacon Lights of History," writes most eloquently of Moses as the first codifier, in these glowing words: "I begin my review of the great actors in the world's history, with the man, who gave the first recorded impulse to civilization, and who is the most august character of all antiquity."

The Roman Law and Codes.—The first recorded efforts of which we have authentic data, looking to a general codification of the civil law, were made by Theodocius II and the Emperor Justinian, A. D. 438 and 528. The Justinian code was formulated and compiled by ten of the ablest lawyers and jurists in the empire. They were allowed ten years to complete the work, but finished their labors in three, producing fifty books in all, which were termed the "digesta, or pandectæ," and were so arranged that, if approved by the emperor, they were to become a perpetual edict. Their compilations could not, however, properly be termed a code, for they were by far too voluminous, ponderous and elaborate, and in 534 A. D. a complete revision was made by three of the most eminent lawyers. They succeeded in reducing the work to twelve books, which

production was sanctioned by the emperor, and enforced as the law of the empire, and subsequently became the basis of all the civil law, and from which, to a great extent, the English common law originated. This embryonic system of codes treated principally: 1, of persons; 2, of things; 3, successions to deceased persons; 4, of obligations; 5, of actions. They were formulated upon the theory that there were two general sources of law: 1, *Jus privatum*, the law that has to do with individuals; 2, *jus publicum*, that which regards the Roman Empire and regulates religious worship and civil administration.

The civil law thus became the special law of the Romans, and was condensed into four books, embracing seven classifications: 1, laws passed by the *comitia curiata*, or *centuriata*; 2, *plebiscita*, which, by the *lex Hortensia*, bound the whole people; 3, *senatus-consulta*, which, especially after the beginning of the empire, had the force of laws; 4, the imperial constitutions, which, by the virtue of the *lex regia*, or law passed by the *comitia curiata*, conferring the *imperium* and the force of the law; 5, the edicts of the prætors, who announced, at the beginning of their year of office, the rules they would follow, which ran on from year to year, under successive prætors, with such additions and changes as each might think necessary; 6, the *responsa prudentum*, who were asked officially by the emperor to give their opinions, which had the force of law; 7, customs, one of the prominent sources of the civil law, but could not prevail as against the general law. Such were, in fact, the sources of what is now generally known as the common law.

And as an illustration of how the civil law as known to the Romans, has been perverted, I need only cite the instance of the law of marriage. It originally provided and declared that marriage must be according to law, and for this there were three requisites: 1, Puberty, fourteen years for husband, twelve for wife; 2, consent of the parties, the intention to be married manifested by the woman passing into the possession of the man; 3, *connubium*, the parties must be legally capable of being married to each other. This did not mean that the parties were absolutely one after marriage under the law, nor did it permit or sanction what is now termed a common law marriage. It has been held in New York and several other states, that persons living together merely as man and wife, without any marriage form or ceremony whatever, constitutes legal, or common law marriage. Such was not the spirit or policy of the Roman civil law. And such a doctrine is contrary to all the rules of good society and government. Far better that the marriage contract be canonized as a sacrament, and that every state of the republic should have a uniform and complete law, upon such important matters, because the sanctity of the marriage contract, and the sacredness of the homes and the domestic circles must be protected if the republic of the United States is to be perpetuated. A complete system of codes, such as is now in force in the state of California, if adopted in all the states, would overcome and cure all such evils.

It must, however, be admitted by every impartial student of history, that society and government are greatly indebted to the Romans and more especially Justinian, for most of the elementary principles of law and jurisprudence.

Prussian and Austrian Codes.—No further efforts were made by any nation to codify the laws until 1730, when Frederick II ordered his grand chancellor as the official law officer of Prussia, to codify all the laws of that country. The work was undertaken with great care, but owing to the

death of the Emperor in 1735, it was abandoned until 1780, nearly fifty years later, when it was renewed and finally completed in 1794, then approved and enforced by Frederick William. In 1753 Maria Theresa, empress of Austria, issued a decree calling for a uniformity and codification of the laws of all the provinces of the Austrian empire. She selected and appointed a commission composed of the ablest lawyers of her realm. Fourteen years later the book was completed, consisting of eight volumes. It was not approved by the government, and the greatest lawyer in the empire, Hadican, was then appointed to revise and compile a code from the eight volumes, upon a different basis. His book was complete and satisfactory to the government, and was printed and published in full in 1786 under Joseph II. It was then submitted to the universities and courts of justice, and finally enforced by decree as the law, July 7, 1810. Those codes thus devised and formulated, became and have ever since remained the general law of those great countries.

French Codification.—The eventful period of the revolution of 1789, under Louis XI, revived the spirit of the teachings of the great Vicarius, and a general desire on the part of the people was manifested to the effect that all the laws of France should be expressed in writing and reduced to one book as a code, that they might thereby get rid of the cunning lawyers. The people were in earnest, and in 1790 an imperial decree was issued requiring a general code to be formulated and expressed in simple and clear language. In 1791-3 provisions to that effect were inserted in the constitution. Cambarenes, the great French lawyer and jurist, devised, compiled and completed an entire civil code. It was generally discussed by the members of the profession at large, and was submitted to a commission, selected from the ablest lawyers, who, at the end of two years, reported the French civil code.

When Napoleon became emperor the code was changed and revised somewhat to conform to the political emergencies, was then reprinted and enforced as the Code Napoleon, and from which the Louisiana code was to a great extent modeled and formulated. It was during this era of enlightened progress that the prophetic soul of Volney, when contrasting the past ages with the probable future, inspired him to write an invocation to his book, upon the "Ruin of Empires," these significant words: "Within your pale, in solitary adoration of liberty, I saw her genius arise from the mansions of the dead, not as she is painted by the impassioned multitude, armed with fire and sword, but under the august aspect of justice, poising in her hand the sacred balance wherein are weighted the actions of men at the gates of eternity."

The English Common Law, so much revered by many of the case lawyers in the United States, and especially the opponents of codification, was and is practically nothing more than the Roman laws revamped and amplified to some extent. Glanville, Bracton, and Fleta, three of the greatest and ablest of English law writers and compilers, engrafted many of the principles of the Roman law into their works, in which they sought to write down and fully express the English law, as culled from the English decisions and rules of law, for the English judges, and in doing so they sought to create a homogeneous whole, which should reflect the wisdom of both the Roman and the English law. In fact, they copied so much that Bishop Nicholson, one of the greatest and ripest scholars of his age, accused them of aping the Roman code. And as a further evidence that what we call the common law of England,

is but a reflex of the Roman civil law, I need only cite Professor Pollock, who, as early as the fifteenth century, wrote as follows: "We find a common law judge declaring that as in a case unprovided for by Roman rules, the civilians devise a new rule according to the law of nature, which is the ground of all law; the courts of Westminster can and will do the like."

In 1605, Professor Colwell, who was one of the most learned lecturers at Cambridge University, on civil law, said to the students: "The common law of England is nothing but a mixture of the feudal and the Roman law." In 1701, Lord Chief Justice Holt, one of the ablest jurists that ever presided in the highest court of that country, in delivering the unanimous opinion of that tribunal, in the postmaster general's case, said: "And this is the reason of the civil law, which though I am loathe to quote, yet, inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law, and are therefore grounded upon the same reason in many things. And all of this may be, through the common law, time out of mind."

The great Blackstone (Cooley's Ed. Vol. 1 p. 36,) in commenting on the elements and origin of law, says: "These originals should be traced to their fountains, as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Cæsar and Tacitus; to the codes of the northern nations on the continent, and more especially to those of our own Saxon princes; to the rules of the Roman law, either left here in the days of Papinian, or imported by Vicarius, and his followers, but above all, to that inexhaustible reservoir of legal antiquities and learning, the feudal law, or as Spelman has entitled it, the law of nations in our western orb." In Vol. 4 pp. 427-8, he further says, "The legal treatises written in Edwards reign, Bracton, Fleta and the rest, are for the most part law at this day, or at least were so till the inauguration of tenure took place." And as late as 1828, Chief Justice Bart of the house of lords, in delivering the opinion in the case of *Gifford vs. Lord Yarborough* said: "But Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as a part of those laws and customs." Bracton was chief justice during the reign of Henry III, and Lord Hale admitted that it was the law of England, as between subject and subject. And in his history of the common law (5 Bing.) he further says: "We know that many of the maxims of the common law are borrowed from the civil law, and are still quoted in the language of the civil law. As for instance, the well known maxim, "every man's home is his castle," every legislative enactment, ought to be prospective and not retrospective in operation, and that no person should be condemned unheard. Feudal Europe changed in many respects the true spirit of the Roman civil law, and it was not until Sirs Edward Coke and William Blackstone, produced their great works, that a new light began to dawn upon an enlightened jurisprudence. The mystic tryst of the faded fabrics of the old Roman customs had to a great extent disappeared, and there was sore need of reformation. If Coke and Blackstone had at that period codified the laws in a general and complete system of uniform application, a far different era would have followed in the due administration of justice. Of the nature of the laws in general, they made two classifications which remain to-day substantially as the laws of England, namely: The *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law. Let us

then for a few moments impartially consider the contrast with that condition of the laws generally, as transmitted to the succeeding generations, and the present California system of codes.

The *lex non scripta*, or unwritten law of England proper, includes not only general customs, or the common law properly so called, but also the particular customs of certain parts of the kingdom; and likewise those particular laws that are by custom observed only in certain courts and jurisdictions. This unwritten or common law is properly distinguishable into three kinds: 1, general customs, which are the universal rule of the whole kingdom, form the common law in its stricter and more usual signification; 2, particular customs, which for the most part affect only the inhabitants of particular districts; 3, certain particular laws which by custom are adopted and used by some particular courts of pretty general and extensive jurisdiction. Chancellor Kent, Vol. I, 360, says: "The common law of the American states consists of the common law of England as modified by English statutes previous to the colonization of America, so far as it had been found adapted to our altered conditions and circumstances. And those English statutes passed afterwards at any time prior to the revolution which were practically accepted and adopted in America became also a part of the American common law." What member of this association, or what lawyer in the state of Michigan could tell without long and careful research, what laws at that time had expired by limitation, or what statutes had been altered or repealed? The supreme court of the state, 1st Mich., pp. 3-4, said that long prior to 1783, Great Britain had dominion over all this country, and that the common law of England was in force, that in 1793, when the territory of the great Northwest was ceded to the United States, the common law was in force generally in this country, and again in 2 Douglass, R. 188-9, the learned judges said: "That the common law was not only in force in this state at that time, but that it was not abrogated by the constitution of the revised statutes of 1833." And so the highest tribunal of this state has repeatedly held and ruled, under common law doctrines and precedents, to the very great detriment of many litigants, and the disparagement of the state, as a commonwealth of the American Union. Mr. Justice Cooley, in the note on page 69, Vol. I, 3rd Ed. of Blackstone, citing the case of *Emerson v. Atwater*, 7 Mich., 12, says: "A precedent flatly unreasonable, and unjust, may be followed, if it has been for a long period, acquiesced in, or if it has become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by over-ruling it.

Is it any wonder that the supreme court is overcrowded with work? This local reference is made because the courts of this state have followed more closely than other states the spirit of the common law. The doctrine of precedent has become so impregnated into her system of jurisprudence that frequently a *nisi prius* judge will say to counsel trying a case: You had better take the opinion of the supreme court upon that point; and most cases are tried in the circuit courts upon the theory that the case will be repealed, and that is done without any motion for a new trial, or an opportunity for the trial court to correct errors, if any, upon mature deliberation.

Codification in the United States.—When the declaration of independence by the American colonies was proclaimed to the civilized world it was the first and grandest achievement of political codification and wisdom ever known in the history of government, and distinctly marked

a new era in the progress of nations. Then followed the "articles of confederation." and later on, in 1789, the federal constitution, all of which were the productions of high-minded, patriotic statesmen, who sought only the protection and welfare of the people. Those documents thus became the basis of the best form and system of government, when properly administered, ever yet devised by man.

On the 24th of October, 1776, Thomas Jefferson, the master spirit of the genius and theory of government, fully inspired with the patriotism of the declaration of independence, and as a member of the first legislative body ever organized on this continent, in the old commonwealth of Virginia, introduced a bill providing for the appointment of a committee of five, whose duty it was to devise and prepare a code of laws for the government of the state of Virginia, changing and compiling those that existed, and eliminating those that were obsolete, and by adding new and necessary enactments. He believed that an aristocracy of intellect and talent under a codified system of laws was the surest element of success and security in a republic composed of sovereign and independent states, and that it would form the strongest bulwark of civil and religious liberty; that the pernicious doctrine of primogeniture and entails should be abolished by express provisions of law; that civil and religious institutions should be defined by a complete system of laws for each and every state. As chairman of the committee he was assigned the task of codifying the common law and British statutes during the period of James I up to the time when the first legislature of Virginia was established. The criminal law and the law of descents were also entrusted to his care and supervision. Other branches were assigned to eminent lawyers upon the committee, who were equally ambitious to give to the people of Virginia a good code of laws.

Mr. Jefferson, after completing his portion, in writing to Mr. Withe, a co-worker on the code, said: "In style I have aimed at accuracy, brevity and simplicity, preserving, however, the words of the established law." It should be remembered that at that time the penal laws of England affixed the death penalty to two hundred different offenses. Jefferson reduced that awful penalty to treason and murder alone. The law of primogeniture was abolished making real estate inheritable in equal partitions by next of kin. The committee faithfully discharged their important duties, and at the end of two years had devised and formulated a complete code in one volume of only 90 pages, consisting of 126 sections in all. The report was submitted to the legislature and discussed for several sessions, when, with several omissions, it was adopted as a whole in 1785. Its most prominent features were the limitation of the death penalty to murder and treason, the repeal of the law of entails, the abrogation of the law of primogeniture securing the equal inheritance among children, the establishing of conditions by which aliens could become citizens and citizens become aliens, and the establishment of religious equality and liberty upon the broadest foundation. It provided for the emancipation of all slaves born in Virginia after the passage of the code. This provision, however, was stricken out by a majority vote of the legislature. It also provided a systematic plan of general education reaching all classes and adapted to every grade and capacity, with elementary schools throughout the state for all children, generally without distinction of rich or poor. It also wisely provided for the endowment of a state university, public library and art gallery for the special education of

artists and sculptors. In fact, it was a perfect model of a complete code, fully comprehending all the essential elements of good government, and the due administration of justice, upon the basis of unity and uniformity of laws in township, county and state. And thus the early impress of the uniformity, harmony and codification of laws was made upon the people of that great commonwealth, which subsequently achieved the imperishable renown of being the "Mother of States and Presidents."

If that system had been followed by all the states, as they were organized and admitted into the union under the federal constitution, our republic would to-day indeed be the bright imperial star of civil order and government above the mountain heights of enlightened progress. For it must be conceded that a republic composed of separate sovereign and independent states, each state having its proper township, municipal, county, and state organization, and all subject to the provisions of the great political codes, the state and federal constitutions, must when the laws are all systematically arranged, unified and codified, as a harmonious and homogeneous whole, survive with imperishable grandeur the corroding elements of corruption and treason, that is, if a government of the people, by the people, and for the people, can be successfully and fully maintained.

The Field Codes.—In 1824-5 Mr. Justice Story, with other distinguished members of the Boston bar, discussed with great ability the expediency of codifying the common law and the laws of Massachusetts, but at that time, as now, there were case lawyers who were devotees of the customs, precedents, teachings, and practice under the common law, and the desired reforms were not achieved. In 1846 the question of codification was much mooted and discussed among the leading lawyers of the Empire State. The constitutional convention of that year provided in the new constitution of New York that the legislature should at its first session thereafter appoint a commission of three, whose duty it should be to reduce into a written and systematic code, the whole body of the laws of that state, or so much and such parts thereof as the commissioners should deem expedient and practicable. And also that a commission of three should be appointed whose duty it was to revise, reform, simplify, and abridge the rules and practice, pleadings, forms, and proceedings of the courts of record. Both commissions were duly appointed by the legislature. The practice commission, of which Mr. Field was an active member, finished its labors on the 31st day of January 1849 and reported the code of civil procedure to the legislature which was subsequently adopted and enacted and has ever since been in force in that state. The civil code commissioners entrusted with the most important work of all, made several reports completing their ninth and final report February 18th, 1865. The work of both commissions when finally completed and submitted, comprised six volumes containing the code of civil procedure, including the law of evidence, the book of forms, the code of criminal procedure, the political code, the penal code and the civil code. The code of civil procedure and the penal code were the only ones ever adopted and enforced in the state of New York.

David D. Field, the "Nestor" of the American bar, and the master spirit of codification in the United States, has given the best years of his life to this great and important work of much needed reform, and now that he is in the golden autumn of his useful life, he enjoys the proud reality and satisfaction, of knowing that twenty-six states of the American Union, have to a certain extent appreciated his labors and adopted his

work. Even old common law England in 1873 adopted his code of procedure. It should be remembered that New York failed to adopt the civil and political codes, and that the most important of all the system, is the civil code, that it is in fact the basic superstructure of all, and hence the results in that state, from only a partial adoption of the system, is no fair criterion for judgment, as to the advantages and benefits to be derived from a complete system of codes.

The California System.—The people of the "golden state," whose majestic mountains are inlaid with gold and silver, and whose glorious climate inspires the genial touch of recognition and progress, and whose people were third in the list of states to respond in money, \$500,000, for the Columbian exposition, are far in advance of the sister states upon the question of codification. Her people are warm hearted, generous and practical. They possess more fully as a community, than others of the American states, the true spirit and doctrine of American independence, progress and hospitality, they are eminently American, and truly homogeneous as to all the institutions of our republic.

As the New England and Atlantic coast states began practically with the laws, customs and precedents of European civilization, so California began her growth as a community and state in the noon day sunlight of the nineteenth century, with all the improved and embellished phases of American civilization and progress. California was from the first, free from any taint of the spirit of feudalism, and she could well afford in framing and forming her fundamental laws to entirely ignore the obsolete customs, forms and shadows of the English common law. As a community, in embryo statehood, they were under military rule from July 1, 1846, to December, 1849, during which latter month the first legislature assembled at San Jose, and in 1850 she was admitted as a free, independent, and sovereign state, into the sisterhood of states under the federal constitution. Naturally her people, in keeping with the promise of that section of fertile country, were desirous of securing the best system of government and laws, that could be found in all the states of the union. When the Field codes were reported and submitted by the commissioners to the legislature of the state of New York in 1865, the progressive men of the profession in California at once secured copies, the constitution of the state of California having previously authorized the legislature to appoint a committee of codification. The Field code served as a basis and guide for the commissioners. They abridged and reduced the laws for the government of the people of the state of California, and for the due administration of justice to a code complete in four volumes, comprising the political code, civil code, code of civil procedure and penal code, which were adopted as a whole by the legislature in 1872, and have now been in full force and effect for over twenty-one years.

The Political Code.—Volume 1 contains 4,505 sections, and was enacted by the legislature in the following language: "Sec. 1. This act shall be known as the political code of the state of California, and is divided into five parts, as follows: Part 1, Of the sovereignty and people of the state, and the political rights and duties of all persons subject to its jurisdiction; 2, of the chief political divisions, seat of government and legal distances of the state; 3, of the government of the state; 4, of the government of counties, cities and towns; 5, of the definition and sources of law, the common law, the publication and effect of the codes, and the express repeal of statutes." Sec. 4 provides (and the same provision is in

each of the four volumes): "The rule of the common law that the statutes in derogation thereof are to be strictly construed has no application to this code. The code establishes the law of this state respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to maintain justice."

The Civil Code.—Volume 2 contains 3,543 sections, and was enacted as follows: "Shall be known as the civil code of the state of California, and is in four divisions": 1, relating to persons; 2, relating to property; 3, relating to obligations; 4, contains general provisions relating to the three preceding divisions. And as an illustration of some of its provisions, and how it declares the well settled principles of law, I may cite sec. 45, as to libel: "Libel is a false and unprivileged publication, by writing, printing, picture, effigy, or other fixed representations to the eye, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him or her to be shunned or avoided, or which has a tendency to injure him or her in his or her occupation." Suppose you were asked to read the statute of Michigan upon that subject? You will find eight different sections, upon eight different pages, relating to the matter, and neither one containing a definition of the term. Upon the question of common carriers, sec. 2168 declares: "Every one who offers to the public to carry persons, property or messages (excepting telegraphic) is a common carrier of whatever he thus offers to carry." Partnership is defined in sec. 2395 as follows: "Partnership is the association of two or more persons for carrying on of business together, and dividing its profits between them." Suppose you were to look for that subject in the Michigan statutes? Query "Is there anything wrong in thus declaring and in writing out the well-known principles of law, that any one of the people may turn to the volume and read in plain and simple language what the terms mean?"

Code of Civil Procedure.—Volume 3 contains 2,104 sections, and is divided into four parts: 1, of courts of justice; 2, of civil actions; 3, of special proceedings of a civil nature; 4, of evidence. Section 307 declares that there shall be but one form of action (Michigan statutes provide for five). Section 420 relates to pleadings, and declares: "The pleadings are the formal allegations by the parties of their respective claims and defenses for the judgment of the court." To illustrate: The issues are clearly determined by the pleadings. A petition plainly states the facts of plaintiff's cause of action, in a brief, concise and logical manner; the answer must aver the defense fully, if any. Contrast the system of Michigan, and what a picture! I have here a declaration in a railway case, in which I am counsel, which was drawn up by one of the ablest lawyers in the interior of the state. There are three counts in the declaration, which cover altogether twenty pages of closely written foolscap. In New York, Missouri or California all the facts necessary to allege in that case could be stated on three pages. In other states the averment of negligence need not state the grade of negligence. It is sufficient if the defendant is charged with negligence, and that the plaintiff is without fault, carelessness or negligence. The court charge the jury as to the degree of negligence, and gives the law on the facts disclosed at the trial. The admission of evidence is therefore strictly limited to the issues as presented in the pleadings. There is no such thing as a plea of general issue. If the defendant relies upon special defense

or the defense of contributory negligence, it must be specifically averred in the answer, and the burden of proof is upon the defendant to establish that defense by a preponderance of evidence. There is no such thing as a negative pregnant.

The Penal Code.—Volume 4 contains 1614 sections and is divided into three parts: I, of crimes and punishments, II, of criminal proceedings; III, of the state prison and county jails. Sec. 187 briefly and correctly defines murder as a crime, as follows: "Murder is the unlawful killing of a human being with malice aforethought.

California thus presents in four volumes a concise and complete system of codes, which contain all the necessary laws for the government of her people, and which laws are written out in plain and simple language, so that every person who can read may know what the law is upon any given subject. Could there be a more desirable system for the due administration of justice in an enlightened community?

What is a code or codification? One of the best definitions that I have been able to discover may be found in that excellent work, "The Encyclopedia of American and English Law," which reads as follows: "Code—codification, a general collection or compilation of laws by public authority. The word is used in America to signify a concise, comprehensive, systematic, re-enactment of the law, deduced from both its principal sources, the pre-enacting statutes and adjudication of the courts, as distinguished from compilation of statute law only, and in making such a revision, the general rule is that when one statute is framed for another, some parts being omitted, the parts omitted are to be considered as amended. For it must be presumed that the legislature has declared its entire will."

Is it possible that any fair minded jurist or lawyer can reasonably for a moment sincerely contend that it is impossible to revise and codify the law? The very able paper which has been submitted by Mr. Barkworth, shows very clearly the necessity for a revision of the constitution of this state, and the same argument will forcibly apply to a revision and codification of the laws of this state, and it is very doubtful if any other state in the union has such an unsystematic, incongruous compilation of statutes.

Codification has been successfully achieved in California, to the entire satisfaction of her patriotic and progressive people, the judiciary, and fair-minded members of the profession. Mr. Chief Justice Wallace, of the supreme court of that state, voicing the opinion of the judiciary and the profession at large in that state, March 22, 1885, wrote as follows: "I think the civil code the most important and beneficial piece of legislation that has ever been enacted in California. It has effected more for the people than all other legislation taken together, since the foundation of the state. I have never seen an unfavorable criticism of it which was in my judgment well founded. I believe that while at first there was some inclination in our profession to hesitate about the propriety of its adoption, our bench and bar are now, with remarkably few exceptions, unanimous in its commendation." The young and promising state of South Dakota, has also adopted the system, and the new state of Washington, the last and one of the brightest and most promising in our glorious constellation of the union, has taken up the California system, with the twenty-one years experience of that state, and is carefully revising the same, and will at the next session of her legislature adopt that system as exemplified by the de-

cisions of California. The American Bar Association, several years ago by unanimous resolution recommended to congress the expediency of codifying the national laws of congress, and a bill to that effect is now pending in the United States senate. Ex-Governor Hoadly, formerly of the state of Ohio, but now of the state of New York, in his very able and eloquent address before the American Bar Association, at Saratoga, August 16, 1888, said: "It will indeed, be a very happy or a very sad day, when an American lawyer can persuade himself that legal principles can be bettered by no re-statement, and that legal methods need no reform; a day happy in the contemplation of perfect results; or sad when, in the decay of the profession, the spirit of inquiry and denial shall have so far departed as to leave its members without desire for improvement of their science or its methods. * * * It is a mockery of justice to say to the unoffending citizen: "The law applicable to your case had not been expounded, but it existed. It was unfortunate for you that your action had to precede its exposition by the courts, more unfortunate still for you if it were your action which provoked such exposition, and if actual expense the true rule were first judicially pumped from the well where the truth of the unwritten law is supposed to dwell, and so prescribe to others."

In More's Utopia, that legacy of wise and lofty thoughts left by the great martyr chancellor, the citizens of the ideal commonwealth are described as having: "But few laws, and such is their constitution that they need not many. They very much condemn other nations whose laws, together with the commentaries on them, swell up to so many volumes; for they think it an unreasonable thing to oblige men to obey a body of laws that are both of such a bulk, and so dark as not to be read and understood by every one of the subjects. * * * Every one of them is skilled in the law; for as it is a very short study, so the plainest meaning of which words are capable, is always the sense of their laws. And they argue thus: All laws are promulgated for this end, that every man may know his duty; and, therefore, the plainest and most obvious sense of the words is that which ought to be put upon them, since a more refined exposition cannot be easily comprehended, and would only serve to make the laws become useless to the greater part of mankind, and especially to those who need most the direction of them; for it is all one, not to make a law at all, or to couch it in such terms that, without a quick apprehension and much study, a man cannot find out the meaning of it." Surely it is now as easy to combine the wisdom of the wisest, the learning of the most studious, the experience of the busiest, and to confide to a body of lawyers thus constituted the task of composing, proposing, endeavoring to prescribe, in set and certain terms, all the law, the need of which this generation can now anticipate, as to leave them dribble out, drop by drop, from the courts of thirty-eight states and territories and the federal judiciary through a long course of years."

Honorable Thomas J. Semmes, of the New Orleans bar, one of the brightest, ablest and most profound lawyers upon the civil law in the United States, in a very able paper read before the American Bar Association at Saratoga in 1882 upon "The Civil Law as Transported in Louisiana," said: "Although the civil code of Louisiana is subject to criticism, its excellence, recognized by distinguished jurists, is attested by the fact that no radical change has been made since its adoption in 1825, save the alteration resulting from the abolition of slavery. In other respects the hand of innovation has slightly touched it, the amendments during a

period of fifty-seven years being few and unimportant." The Louisiana code is complete in three volumes.

Honorable Thomas M. Cooley, one of the ablest jurists, and author upon constitutional law, in the United States, at a session of the same association in 1881, in a paper upon "The Recording Laws of the United States," said in speaking of the defects of our system: "If we look in the statutes to see who may certify to the execution of conveyances we are struck at once with the enormous number. Any judge or clerk of a court of record, court commissioner, county clerk, notary public or justice of the peace may perform this important ceremony." This evil however has to a very great extent been overcome by the method of reform he submitted, and the uniformity of laws in that respect since passed by the several states brought about by the association.

Honorable John F. Dillon of national and world-wide fame as a jurist, lawyer, and author, in a paper prepared at the request of the committee on judicial administration and remedial procedure on the law reports and law reporting, read before the association at its session in 1886, said "The federal reports up to that year were 409, miscellaneous reports 203, and American State reports 3,186, in all 3,798. Over two hundred and fifty years ago the accumulation of statute reports were almost immeasurably less than they are at the present time. The most distinguishing feature of the common law of England, and America is the rule of judicial precedence, or the binding force of adjudicated cases as rules of decision for like cases. In no other system of jurisprudence is such force given to judicial judgments. The result is that elsewhere than in Great Britain and America, the judicial reports are comparatively few, since judicial judgments have no authority and theoretically no higher rank than expositions or comments of private writers. The corresponding result is, according to a recent statement, that in 1881 the judicial reports of England included 2,944 volumes, and in this country 3,798. And they are increasing at the rate of over one hundred volumes a year. Where, I inquire, is the multiplication of reports to end?"

Again Mr. Semmes, in his able and eloquent annual address, before the American Bar Association in 1886, in speaking of the Louisiana code said: "Although adopted in the year 1824, with the exception of three amendments, made in the years 1844, 1850, and 1852, the code has remained substantially intact. The civil code is regarded in Louisiana as a sacred temple; and whenever the sacrilegious hand of the innovator, is raised to change it, the attention of the bar and of the bench is at once aroused, and no alteration is permitted without careful scrutiny and thoughtful consideration of its effect on the structure. This is one of the principal effects of a logical code; it cannot be changed in one part without affecting other parts, and the guardians of the sacred deposit are ever on the alert to protect it from desecration."

In the light of such testimony from eminent and learned members of the profession, who know and have experienced the wisdom, practical workings and benefits of the code system; can any fair-minded man doubt the expediency of codifying the laws of the states, and especially those of Michigan? With equal force and logic the same argument illustrates and applies to our system of national and state constitutions. They are, at least many of them, and especially that of Missouri, bright models of the codification of the elemental principles of our government. Most of them were considered and formulated with great care and profound delibera-

tion, and they have stood the test of nearly a century without much change, and little amendment. The federal constitution, with the ten amendments which congress engrafted upon the original document, was adopted March 4th, 1789, over a hundred years ago, and only six amendments have since been added during that entire period of time.

Of all the states of the Union, Michigan has the weakest constitution, and the most confused and imperfect condition of common and statutory laws, and in that respect to a certain extent it may be said she is quite like confusion confounded. Her transitory era from a French Canadian settlement and element to the embryonic period of statehood, is one of the most remarkable in the history of states. The original tribes of Indians, untutored in the arts of civilization, and very romantic, as children of the primitive forests and lakes, were easily beguiled by the emotional and coquettish Frenchmen, so that it may be said that at an early day the impress of Canadian French characteristics was made upon the people of this section, and for many years the governmental basis was *quasi* French in character, with many decrees and edicts directly from Paris. From 1789 to January 26, 1837, a period of 48 years, Michigan wore the primitive robe of territorial development, and then entered the Union under a written protest passed in convention at Ann Arbor, December 15, 1836. (See Vol. I, Howell's Statutes, p. 340).

From 1837 to August 15, 1850, she assumed the swaddling clothes of statehood, mantled only by an imperfect constitution, which overcame her, not only as a summer cloud, but quite like the crude blanket that covered her native Indians. Of the constitution adopted in 1850, the supreme court, 5 Mich., 251, and 13 Mich., 162, said: "The object of the constitution is not to make specific grants of legislative power, but to limit that power where it would otherwise be general and unlimited, and to impose certain duty upon the legislature and other departments of government. It was made for the purpose of correcting the real or supposed defects in the former constitution of the state, and should be construed with reference to that instrument, in order to discover and avoid the evil, if any, arising from it. It should be interpreted in the sense in which it was understood by the people at the time of its adoption." A most remarkable comment upon the fundamental laws of a sovereign state, which now boasts of one of the greatest universities in the world. And yet it is not surprising because we find in section one of the schedule of that constitution, this humiliating concession and provision: "The common law and the statute law now in force, that is in 1850, not repugnant to this constitution shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature." Sec. II provides: "All writs, actions, causes of action, prosecutions and rights of individuals and of bodies corporate, and of the state, and all charters of incorporation shall continue as if no change had taken place." And yet learned gentlemen contend that Michigan does not need a codification of her laws! Who can find out without long and careful research from that constitution, or the statutes subsequently enacted what laws prior thereto were repugnant to it, what ones remained in force, until they expired by limitation, or have been altered or repealed by subsequent legislation? Howell's Statutes is composed of three ponderous volumes containing 9801 sections, 3647 in Vol. I, 6255 in Vol. II, and 9899 in the third and last volume, eight thousand and thirty-one sections more than is contained in the entire system of the California codes. The evolution of the law, because of the

aping in England of the Roman law, and in this country of the English common law, and the scattered and uncertain fragments of the old Roman civil law, has been slow and unsatisfactory. The doctrine of common law and precedents has obscured the better elements of progress so that in some respects, even at the end of the nineteenth century, so far as enlightened jurisprudence and the due administration of justice is concerned, we are quite like the seventeenth century in the shadows of the middle and feudal ages. Early in the seventeenth century the English judges by decisions practically abrogated the ancient Irish law, which gave a married woman some right and power in dealing with her own property without the consent of her husband, but the spirit of the evolution of the law, and the far-sighted statesmanship of the Grand Old Man, whose broad spirit of progress and home rule is shaking Old England to the very center. Lord Selden in 1882 was inspired to introduce an act in parliament, which passed, making all wife's property free from the husband's control, and giving her the right to convey, sue, and be sued, without the husband's sanction, which legislative enactment is one of the greatest steps towards the emancipation of woman, save perhaps the recent act of the Michigan legislature which gives to woman the right of suffrage.

All the American states can and should keep in advance of all nations in the progressive elements of law, government and reform. As to the doctrine of the old common law, and of precedents, of England, long since obsolete, and never codified, we can say to its devotees in that country as well as in this, what Benjamin Franklin said to Sir Richard Walpole, in the primitive days of our country. Walpole was then prime minister of England, and he was instrumental in sending many convicts out of that country to America, which so provoked Franklin, that he wrote to the English minister a very caustic letter, expressing the thanks of the colonies, for the maternal care of Great Britain to this country so strongly manifested, and that as an expression of American gratitude, he had the honor to ship him that day a collection of rattle snakes, and to respectfully suggest that he have them introduced into his majesty's garden at Kew, in order that they might propagate and increase, at the same time assuring his excellency, that they would be as beneficial to his majesty's English dominion, as British convicts were to America. In keeping with that historic incident I may be permitted to quote from the very eloquent speech, which it was my privilege to hear, made by the present chief justice of England, Lord Coleridge, at the reception tendered him by the New York State Bar Association, in 1883, he said: "You have lately procured, may I say most wisely, a great national park, into which the beauties and glories of nature, and strange and eccentric forms which natural objects sometimes assume, may be preserved forever for the instruction and delight of the citizens of this great republic. Could it not be arranged that, with the sanction of the state, some corner in that one park, should be preserved as a kind of pleading park, in which the glories of the negative pregnant, *abseque hoc*, *replication de injuria*, rebutter, and sur-rebutter, and all the other weird and fanciful creations of the pleader's brain, might be preserved for future ages, to gratify the respectful curiosity of your descendants, and that our good old English judges, if ever they re-visit the glimpses of the moon, might have some place where their weary souls might rest, some place where they might still find the form preferred to the substance, the statement to the thing stated.

"In harmony and in keeping with that brilliant suggestion it would be most appropriate to erect in that consecrated corner a memorial slab, commemorative of our American brethren, who adhere so fondly to the doctrines of the old common law and precedence and who so strenuously oppose all reforms and codification, and upon that tablet engrave as an appropriate epitaph these significant lines from the gifted poet Goethe:

'Your laws must be antique to please,
Hereditary, like disease.
Slowly they pass from race to race
And drag themselves from place to place.
Obscure has grown what once was plain
What was a benefit, a bane,
Alas, that rights we should have none
Save from our fathers, dead and gone.'

"And then perchance in after years some descendants of these noble sires, journeying westward to behold the majesty and grandeur of the bold Rocky Mountains, visiting the Yellowstone Park in the region where the mystic geysers boil and bubble like ominous symbols of Dante's Inferno, and there pausing, at the particular spot, reading the epitaph he may be inspired to soliloquize:

'Oft would I come to this great place,
To breath the airs that ruffle thy face,
And gaze upon this sacred spot,
Of wisdom lost and quite forgot.
I'll think of these in pensive tears
As those beguiling, in greener years.'"

The great Chancellor Kent, when asked by a hopeful law student what made him a great lawyer, laconically replied, "Lack of law books." Emphatically he was not a case lawyer. Robert Ludlow Fowler, Esq., of the New York bar, in his very able essay upon codification, written and published as a reply to Mr. Carter, truly said: "The scope of codification is concerned only with laws evolved by the persons and in the modes indicated, not with custom nor with any of the vague conceptions of those who regard codification of the private law as practically unattainable." And of reports he says: "Piled up in all manner of volumes, thousands upon thousands are these isolated, illogical and fragmentary laws. The adherents of codification simply insist that these dispersed expressions of substantive law are susceptible of being selected by skillful and logical persons, and when selected of being classified, their inconsistencies and redundancies being first expunged. . . . When the codifier has found these laws he lodges them between single covers, that common people and not logicians and experts alone, may better apply them to the myriad shifting phases of human affairs."

Justinian long centuries ago wisely instructed his codifiers to select what was useful, omit what was antiquated, or superfluous, avoid unnecessary repetition, get rid of contradictions and make such other changes as would produce out of the mass of ancient judicial writings a useful and complete body of laws. The Jeffersonian code, the Field code, and the California system of codes, were modeled and formulated upon the same theory. Had the Justinian system prevailed, imperial Rome in all her splendor would have survived with her ancient glory. Before that event,

however, the seeds of ruin and decay had been scattered among her people, men forgot their honesty, and the person who could not be bribed was not respected as an upright man, but rather regarded as a personal foe, morality and purity of life were treated as antiquated things among all ranks of society, to be poor was not only a disgrace, but regarded as a crime. At last the church and state under the Emperor Constantine were merged, and under canon 7 of the Council of Arles, A. D. 314, bishops were given jurisdiction over the civil magistrates within their respective sees. And the empire was for a time a religious state and termed the kingdom of God. The bible as interpreted by the bishop became the code of civil procedure as well as of religion. And thus the glory of Roman jurisprudence wasted away.

A system of codes like those of California if adopted, in all the states, under our form of government of written constitutions, will save our republic from ruin and decay, because the people who are the source of power, and the true sovereigns of the republic, could thus learn to know and respect the laws. As an illustration of that fact, I need only cite Mr. Mechem, now professor in the law department of the University of Michigan, who in the last edition of his work on agency, in the appendix, has five pages quoting at length sections of the California code, as elementary principles of law. Mr. Justice Story in his excellent work upon the constitution pronounces the theory on which the common law was established in this country most perplexing, because of the want of certainty as to what part of the English common law was in force here. "It is not easy to settle what parts of the English law are or are not in force here until either by usage or judicial determination they have been recognized as absolute force."

It should be remembered that it was not until 1819 that England abolished the "wager of battel" system, and why should this enlightened, free and progressive country longer follow the darkness, uncertainty and shadows of the obsolete common law? Ours is a republic of states, under written constitutions, or as was prophetically emphasized by the immortal Lincoln in his famous speech at Gettysburg, a "government of the people, by the people, and for the people."

From the genesis of the law, as found in the ten commandments, and the twelve tables of the Roman civil law, we may trace the evolution of law by slow degrees down through the ages to the constitutions of the United States, and states, and the California system of codes. With such systems as California presents, there would come to each and every state, new strength and vigor, and better state life, as was more eloquently expressed by the Hon. George G. Wright of Iowa, president of the American Bar Association, in his annual address in 1888, in which as a staunch republican he said: "And the perpetuity of the Union rests upon the separateness and integrity of this state law. I confess that I am not so much impressed by the magnitude of our country as I am by the wonderful system of our duplex government in unity, which permits the freest development of human nature, and the most perfect adaptability to local conditions. I can conceive of no greater enemy to the Union than he who would by an attempt at further centralization weaken the self dependence, pride and dignity of a single state."

With a perfect system of codification, of state, national, and international laws, such as California has obtained, we might reasonably expect

for the coming of that golden period yet hidden in the womb of time, when the universal law of "Peace on earth good will to man," shall govern all enlightened states and nations, and with the happy poet we could exclaim:

"Then no more shall nation against nation rise,
No ardent warriors wait with hateful eyes,
No friends with gleaming steel be covered o'er
The brazen trumpet kindle rage no more.
But useless lances into scythes shall bend,
And the broad falchion in a plowshare end;
All crimes shall cease and ancient frauds shall fail
Returning justice, lift aloft her scale,
And peace o'er the world her olive wand extend,
And white-robed innocence from heaven descend."

CONSTITUTION AND BY-LAWS.

CONSTITUTION.—ARTICLE I.

Name.—The name of this association shall be: "The Michigan State Bar Association."

ARTICLE II.

Objects.—The objects of this association shall be: To maintain the honor and dignity of the profession of the law; to increase its usefulness in promoting the due administration of justice; and to cultivate social intercourse among its members.

ARTICLE III.

Membership.—SECTION 1.—Members of the bar of Michigan in good standing and authorized to practice in the courts of the state of Michigan, judges of the supreme and circuit courts of the state, and judges of the United States circuit and district courts for Michigan, may become members of this association.

SECTION 2.—Each application for admission to membership must be endorsed by a member of the association and sent to the secretary. The secretary shall submit applications to the board of directors, which shall have full power to admit to membership.

SECTION 3.—The annual dues shall be \$3, payable to the treasurer at the annual meeting or within two months thereafter. Members two months in arrears shall be expelled from the association by a majority vote of the board of directors. Upon satisfactory explanation of default in payment of dues, the board of directors may reinstate any member.

ARTICLE IV.

Officers and Their Duties.—SECTION 1.—The officers of the association shall be a president, a secretary, a treasurer, and board of directors of five members.

SECTION 2.—The president shall act as chairman of the board of directors, prepare an annual address, audit all bills, and perform the duties usually incident to the office of president. In the event of his inability to perform the duties of the office, the board of directors shall appoint some one to act in his stead.

SECTION 3.—The secretary shall act as secretary of the board of directors, shall prepare an annual report, and perform the duties usually incident to the office of secretary.

SECTION 4.—The treasurer shall prepare an annual report, and shall perform the duties usually incident to the office of treasurer. His accounts shall be audited by a committee appointed by the president.

SECTION 5.—The board of directors shall consist of the president,

secretary, and three other members, elected by the association. It shall prepare the program for the annual meeting. It shall have the entire management of the affairs of the association, subject to the constitution and by-laws.

ARTICLE V.

Meetings.—The association shall hold its annual meeting at Lansing on the first day of the June term of the supreme court, or at such time and place as the board of directors may determine. Special meetings may be called by the board of directors.

ARTICLE VI.

Amendment.—This constitution may be amended by a three-fourths ($\frac{3}{4}$) vote of the members present at any annual meeting.

BY-LAWS.

1. Standing Committees.—There shall be two standing committees of the association: (1) On legislation and law reform; (2) on legal education and admission to the bar. They shall consist of five members each, and shall be appointed by the president.

1. Committee on legislation and law reform. It shall be the duty of the committee on legislation and law reform:

(a) To procure, after the time has expired for the introduction of bills at each session of the legislature, copies of all bills introduced which affect in any way the law or its practice in the state; and to ascertain and judge of the need or propriety of such proposed legislation. It shall take such steps as it shall deem necessary and proper to postpone the enactment or accomplish the defeat of any of such measures as they may consider unwise or injurious.

(b) To ascertain and report to the association such legislation as it may consider necessary to carry into effect the suggestions contained in the reports of committees and papers read at any meeting, and to prepare and present such legislation to the association in the form of bills or joint resolutions appended to its report. It shall present to the governor and legislature, in the form of a memorial, such measures as are endorsed and recommended by the association, and, in the name of the association, shall take such steps as may be proper to ensure the enactment of such bills and joint resolutions.

(c) To observe the working of the judicial system of the state, collect information, examine projects for changes or reforms in the system, and recommend to the association such action as it may deem expedient.

(d) To cause information to be given, between September 1 and November 1 of each year, through the public press or otherwise, that it at all times invites suggestions, formulated, in writing, as to changes in the law relating to the administration of justice, which suggestions shall be mailed and addressed to the secretary of the association and indorsed, "For the committee on legislation and law reform."

2. Committee on legal education and admission to the bar. It shall be the duty of the committee on legal education and admission to the bar to take into consideration the subject of legal education and other requisites for admission to the bar, and to recommend to the association

such changes as it may deem necessary to propose in the laws, system and mode of legal education and of admission to the practice of the law in the state.

II. Order of Business.—The order of business at the annual meetings shall be as follows:

- (a) Reading of minutes of preceding meeting.
- (b) Address of the president.
- (c) Report of the secretary.
- (d) Report of the treasurer.
- (e) Report of the board of directors.
- (f) Report of committee on legislation and law reform.
- (g) Report of committee on legal education and admission to the

bar.

- (h) Reports of special committees.
- (i) Election of officers.
- (j) Miscellaneous business.

III. Publications.—The proceedings of the annual meetings shall be published in the "Michigan Law Journal", the official publication of the association, which shall be regularly sent to each member, and for the maintenance of which, two and one-half dollars of the annual dues of each member shall be appropriated.

All addresses and papers read at the annual meetings shall be lodged with the secretary.

IV. Amendment.—These by-laws may be amended by a majority vote of the members present at any meeting.

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HON. GEORGE H. DURAND, president of the Michigan State Bar Association, has appointed the following, members of the committees of the association, under the new constitution: On legislation and law reform, Edward Cahill, Lansing; George P. Wanty, Grand Rapids; Alfred Russell, Detroit; Henry M. Duffield, Detroit; and George W. Weadock, Saginaw; on legal education and admission to the bar, Claudius B. Grant, Lansing; John W. Champlin, Grand Rapids; Edwin F. Conely, Detroit; Charles H. Wisner, Flint; Dallas Boudeman, Kalamazoo.

THE fourth annual meeting of the Michigan State Bar Association, although not a pronounced success in point of attendance, was nearer to what such meetings should be than any that have preceded it. The association is undoubtedly becoming more influential in the state. Its growth is slow, but the fact that all of those assigned to read papers were present and prepared, is evidence that a greater interest in the affairs of the association is being manifested through the bar of the state. If backed by a large and active membership, the association is capable of exerting a powerful influence upon legislation in the state. It is now re-organized and upon a new basis, and is so constituted that it can accomplish something of practical value to the profession, and especially to the people of the state. But the large membership is lacking, and all the energies of the officers and members should now be directed to the increasing of the membership. The portions of the addresses of Ex-President Cahill and President Durand, bearing upon the necessity of increasing the membership, are very much to the point and are commended to the reading of every

member. The process of election to membership consists of submission of application, endorsed by a member, to the secretary, who will present it to the board of directors which elects. All of the present members, without waiting to be urged, should take upon themselves the duty of inducing all the members of the bar, of good standing, in their respective localities, to make application for membership.

MONTHLY RECORD OF SUPREME COURT DECISIONS.*

ADMINISTRATION—Legal title in administration—He must make distribution according to decree of probate court—Bill to restrain prosecution of suit to recover value of property from administrator. *Crane v. Michigan Trust Co.* McGrath J. Appeal from Kalamazoo. Reversed.

ASSUMPSIT—Common counts—Claim not recoverable under, when assigned—Agency to contract—Lumber broker not agent of plaintiffs. *Pierce v. Closterhouse.* McGrath, J. Error to Kent. Reversed.

ATTACHMENT AND SALE—Effects of failure to file affidavits and issue writs the same day—Estoppel of party who failed to interpose objection attime of sale. *Northern Mich. Lumber Co. v. Lyon.* Grant, J. Error to Emmet. Affirmed.

BRIDGES AND HIGHWAYS—Liability of town for injuries from defective bridge, which, although erected by private persons, was used as a public way and no warning given by the town that it was not a public highway. *Detwiller v. Lansing.* Montgomery J. Error to Ingham. Affirmed.

CERTIORARI—Writ will not be granted after any considerable delay. *Detroit v. Murphy.* McGrath J. Certiorari to Recorder's Court of Detroit. Writ dismissed.

CONTRACT—When delay or conduct of party will bar right to avoid contract on ground of fraud or misrepresentation. *Wylie v. Gamble.* Long, J. Affirmed.

CONTRACT OF INSURANCE, when not consummated—When Sunday laws not applicable—Agency to deliver policy—Revocation of authority. *N. Y. Lumber and Woodenware Co. v. People's Fire Ins. Co.* Montgomery, J. Case made from Bay. Affirmed.

CONTRACTS—Construction—Consideration, the construction of railroad between certain points. *Gardner v. Walsh.* Montgomery, J. Appeal from Bay. Affirmed.

CONVEYANCE—Bill to Compel—Effect of verbal promise to convey. *Loth v. Frederick.* Grant, J. Affirmed.

CONVICTION—What constitutes—What is proof that statute is in force—Sale of fermented cider. *People v. Adams.* McGrath, J. Exceptions from VanBuren. Affirmed.

EJECTMENT—Findings of facts—Homestead, abandonment of, how shown—Burden of proof—Right to question execution sale in action for ejectment. *Hoffman v. Buschman.* Hooker, C. J. Affirmed.

EQUITY, actions brought before courts of—When remedy at law not deemed adequate. *Holmes v. Seymour et al.* Long, J. Affirmed.

EVIDENCE—Work and labor performed—Testimony, a part of *res gestæ*—Evidence of talk forming part of contract admissible—Statements of counsel before jury in a former trial of same case, not admissions—Improper remarks of counsel, as error. *Evans v. Montgomery.* Hooker, C. J. Affirmed.

* Copies of the opinions of the supreme court may be obtained, upon application, from Charles C. Hopkins, clerk of the supreme court, Lansing, Mich.

EXECUTION—Proof of acceptance to establish exemption—Cross-examination, objections to, how should be made to entitle to take exceptions. *Hutchinson v. Whitmore*. Long, J. Affirmed.

EXECUTION—When equitable owners of land not entitled to enjoin sale—Application of rule as to resulting trusts—When conveyance from holder of legal titles, after levy, of no effect. *Barnes v. Munro, et. al.* Grant, J. Reversed and bill dismissed.

EXECUTION SALE, validity of—Sale valid if notice published before statutory period, though deed made after expiration—When plaintiff entitled to amendment of declaration—When entitled to submit to non-suit *Lerdman v. Hirth*. Grant, J. Reversed, and new trial.

FRAUDULENT CONVEYANCE—Property conveyed to wife to defraud creditors—Deed set aside—Insolvency sufficiently proved in plaintiff's bill which alleges conveyance of only property defendant possessed.—*Dunback v. Collier*. Long J. Appeal from Ingham. Affirmed.

FRAUDULENT CONVEYANCE—Unauthorized appearance and failure of defendant to promptly move to vacate judgement. *Corbitt v. Timmerman*. Grant J. Appeal from Kent. Affirmed.

GUARANTY OF COLLECTION—What constitutes due diligence—Legal process—Waiver—Pleadings. Error to Jackson. *Clark v. Kellogg*. Montgomery, J. Affirmed.

HIGHWAYS—What constitute—Right of railway company to fence in right of way. *McNamara v. Minneapolis, St. Paul, etc., Railway Co.* McGrath, J. Error to Schoolcraft. Reversed.

HOMESTEAD RIGHTS—Cannot be heard as a defence to an action for ejectment, when not interposed in two preceding actions. *Bemis v. Conley*. Grant J. Error to Tuscola. Affirmed.

INSURANCE—Withdrawal of securities deposited with state treasurer, when mutual company ceases doing business—Reasons therefor. *Hooker, C. J.* Petition dismissed.

MANDAMUS—Not allowed when other legal remedy—Powers of probate court statutory—No power to vacate decree admitting will to probate. *Corby, relator v. Probate Judge*. Hooker, C. J. Mandamus denied.

MECHANICS' LIEN—Material man—Statute of frauds—Original promise—Construction of contract as to time of payment—Party not appealing cannot have relief for rejected claim—Notice of lien not necessary where contract is directly with owner—Description of lot—Homestead right. *Lamont v. LeFevre*. Hooker, C. J. Appeal from Bay. Affirmed.

MORTGAGE—Distinction between mortgage and conditional sale—Gaming contracts, how treated. *Reed v. Bond*. Montgomery, J. Affirmed.

REPLEVIN—Against whom demand must be made when the goods were purchased by father, are in possession of son, and upon which mother had bill of sale or mortgage—Variance in description of articles in writ and declaration, effect of—When and how to take advantage of variance—Earnings of minor son belong to father—Violation of rule 61. *Reeder v. Moore*. Hooker, C. J. Error to Muskegon. Affirmed.

SALOONKEEPERS—Sufficiency of complaint against, for keeping saloon open on Sunday—What sufficient grounds to challenge juror for cause, *People v. Wheeler*. Montgomery, J. Reversed, and new trial.

STREET OPENING—Appeal—Effect of notice of appeal served on only

one of defendants. *Grand Rapids v. C. and W. M. R'y Co. et al. Hooker, C. J.* Appeal from Kent. Appeal dismissed.

STREETS—Acceptance of lands dedicated to public use, how may be shown—Validity of plat—When question may be submitted to jury. Long, J. Affirmed.

TRUST—Bill by trustee to reduce trust funds to possession and for receiver—Effect of failure to raise question of multifariousness and want of parties by demurrer before answer—When beneficiaries not necessary parties. *Snook v. Pearsall. McGrath, J.* Affirmed.

BOOK REVIEWS.

CLEMENT'S DIGEST OF FIRE INSURANCE CASES.—By George A. Clement of the New York bar. New York: Baker, Voorhis & Co.

This is a digest of fire insurance decisions in the courts of the United States, Great Britain and Canada, from the earliest period to date, with reference to statutory provisions, and including the New York standard form of fire insurance contract annotated, and other standard forms. This New York standard form is taken as the basis of analysis and classification. It is the form that is in general use throughout the United States, with the exception of Massachusetts and New Hampshire. It is divided into twenty-four sections, each being separated as to subject matter and the cases cited under appropriate headings. This is a novel method of arrangement, but it is convenient and easily understood. The work is applicable to all states in the country, whether a standard form is in use or not. There is an appendix in which are printed other forms. The table of contents is large and admirably arranged. There are also valuable cross references and an index which is full enough to satisfy ordinary use. This book is a recognition of the value of legal authority outside the state reports. It includes citations of the various reporters and many law journals, following in this respect the example set by the *Lawyer's Reports Annotated*. It is valuable chiefly to insurance specialists, and as it has a clear field, will meet the large sale which, as a careful compilation, it deserves.

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*THE PRACTICAL UTILITY OF THE STUDY OF THE SCIENCE OF JURISPRUDENCE.**

LAWRENCE MAXWELL.

In determining the subject of my address to you to-day, I have not been unmindful of the occasion. Most of you are at the threshold of the profession. You have completed a prescribed course of study; you are about to enter upon the active work of your lives. You are looking forward, it may be, with cheerful confidence, or it may be with anxious hope, to the days that are before you; and it would not be unnatural if, in such a situation, you would prefer to hear something of the history and traditions of the profession upon which you are about to enter; something of the men to whom it has brought fame or fortune; something of the stories of their lives; something, in short, from a member of the profession, to confirm the hopes and encourage the aspirations with which your hearts are filled on the eve of your graduation. But it has seemed to me that I might best show my appreciation of the honor which you have conferred upon me in inviting me to address you, and might best recognize and, in a feeble way, help to preserve the traditions of the occasion, heretofore adorned by addresses of learning and power from men of high position and justly distinguished in the profession, if I were to invite your attention to a subject of a more serious nature, which, it seems to me, hardly receives the consideration that it deserves, even from the schools of law, and which, to the great majority of practicing lawyers, is a sealed book.

The ordinary practicing lawyer looks upon the science of jurisprudence as a fad of the schools. He does not know who

* An address delivered by Mr. Lawrence Maxwell, Jr., solicitor general of the United States, to the graduating class and alumni of the law department of the University of Michigan, in University Hall, Wednesday, June 23, 1893.

John Austin was, or what he did. He has heard his name, which he associates with the names of Bentham and Mill and other "theorists," as he is pleased to call them. He has never read Holland. He looks upon a disciple of Austin with something of the same sort of compassion with which the practical politician regards the scholar in politics; as a theorist, a pedant, one who lives in the clouds and is given to speculations and refinements which unfit him for the practical affairs of life. It is because of this sentiment, far too common even yet at the bar, and because I regard the study of the science of jurisprudence as one of the most important and practically useful subjects which can engage the attention of a lawyer, that I ask you to consider it to-day, with special reference to its practical utility.

I know that in this school of learning, where science is studied for its own sake, it is not necessary to claim attention to the study of any science, especially the study of the science of the law, upon the ground of its practical utility; but when that study is disparaged or discouraged by men whose standing in the profession gives influence to their sentiments, we are justified in exposing the error of their view and in showing, if we can, that it rests after all upon nothing but unfounded prejudice. What is the science of jurisprudence, which these practical men would discredit? It is nothing but the classification of law upon a scientific basis; nothing but the application of logic to law; nothing but a systematic arrangement of the fundamental principles of law, under which it is possible to classify and distribute every actual system of law. The science of jurisprudence does for law what the science of botany does for plants, what the science of zoology does for the animal kingdom, what the science of geology does for the earth, what the science of astronomy does for the heavenly bodies, what every science does for its subject matter. By a process of logical abstraction it brings masses of isolated facts into appropriate groups, thereby enabling the student to obtain a clear and comprehensive and connected view of the whole, and to understand clearly and appreciate precisely the relations of each part to every other part, and to the whole. Surely, such a study is worthy the attention of every lawyer; and we may well ask how any lawyer can justly claim the title who has not mastered it.

The science of jurisprudence, as thus understood, has only been called prominently to the attention of English and American

lawyers within comparatively recent times. The reason for this is not difficult to discover. In the first place, we would naturally expect to find, in the law, as in every other department of human affairs, that practice has preceded science. No science has been invented or conceived *a priori*. Systematic classification and arrangement has always followed a long course of practical dealing with isolated phenomena, whose relations to each other have not been perceived at first. And this is especially true of English law, which is the outgrowth of decisions made from time to time, in cases as they have happened to arise in the controversies of men. These decisions the state, in England or America, did not gather together, so as to classify and arrange them into a systematic whole, or code. That work was done for Roman law by the state, but in England it was left to private enterprise and was undertaken by Sir William Blackstone, in a course of lectures delivered by him at the University of Oxford, in 1758. I have no disposition to underrate the great value of Blackstone's Commentaries, but he accepted an arrangement of the law, based upon an analysis of Lord Chief Justice Hale, which is now known to be indefensible as a scientific classification. Blackstone supposed he was following the system of the Roman institutes, which, in fact, he misconceived, through a wrong translation of *jus rerum*, and a misunderstanding of the distinction, in Roman law, between *jus rerum* and *jus personarum*.

The civil law was little studied in England, and Blackstone's arrangement passed there unchallenged until John Austin took the field. Austin is an interesting personality. At a very early age he entered the army, in which he served for five years. He was called to the bar in 1818. It is said that the eminent lawyers, in whose chambers he had studied, spoke of his talents and of his application in unqualified terms, and confidently predicted for him the highest honors of his profession. But soon after his call it became evident that he was to fail as a practicing lawyer. His devoted wife thus describes the situation: "His health was delicate; he was subject to feverish attacks which left him in a state of extreme debility and prostration, and as these attacks were brought on by either physical or mental excesses, nothing could be worse for him than the hurry of practice or the close air and continuous excitement of a court of law. And if physically unfitted for the profession he had chosen, he was yet more disqualified by the constitution of his mind. Nervous and sensitive in the highest

degree, he was totally deficient in readiness, in audacity, in self-complacency, and in reliance upon the superiority of which he was conscious, but which oppressed rather than animated him. He felt that the weapons with which he was armed, though of the highest temper, were inapplicable to the warfare in which he was engaged, and he gradually grew more and more self-exacting and self-distrusting. He could do nothing rapidly or imperfectly. He employed a degree of thought and care out of all proportion to the nature and importance of the occasion. These habits of mind were fatal to his success and business. . . . He was, as he says, intolerant of any imperfection, and so long as he could descry the smallest error or ambiguity in a phrase, he recast it again and again until his great mind could no longer suggest an objection or a difficulty. This was not the temper which could accommodate itself to the imperious demands of business. After a vain struggle in which his health and spirits suffered severely, he gave up the practice in 1825."

When the University of London was established in 1826, it was expected not only that it would receive classes of persons who were not admitted to the ancient universities, but that it would foster and encourage sciences which their conservative spirit excluded. Among the sciences which it was proposed to teach was jurisprudence, and John Austin was called to fill the chair. As soon as he was appointed, he resolved to go to Germany, in order to study on the spot, what had been done and was being done by the great jurists of that country, for whom he had already conceived a profound admiration. He studied accordingly at Bonn, which was then the residence of Niebuhr, Brandis, Schlegel, Arndt, Welcker, Mackeldey and Heffter. He returned to England in 1828 and opened his lectures at the University of London with a class which included many men who later became eminent in law, politics, or philosophy. No provision was made by endowment for the maintenance of his chair. He was obliged to depend upon the fees of students, and, finding that his subject was not in demand among the great majority of law students, who were disposed to regard their profession only as a means of making money, he felt compelled to resign his professorship. He gave his last lecture in June, 1832. Two years later he was engaged to deliver a course of lectures on jurisprudence at the Inner Temple. But it soon became apparent that the same causes which had rendered his appointment to a chair of jurisprudence abortive at London Uni-

versity, were in operation in the Inns of Court. The demand for scientific legal education had not been created; the eminent lawyers who had adorned the English bar and bench had been formed by a totally different process, and the young men entering on the profession were, for the most part, indifferent to any studies but those which had enabled their predecessors to attain places of honor and profit.

In 1832, while he held his chair at the University of London, Austin published a volume which contained an outline of his scheme, and a full exposition of so much of it as related to the determination of the province of jurisprudence. He entitled this volume "*The Province of Jurisprudence Determined.*" I can hardly recommend its study on the ground of practical utility. It is largely devoted to the polemics of Benthamism, and to digressions upon such subjects as the psychology of the will, codification, and utilitarianism, which are apt to discourage the student bent upon the main subject. This is the only portion, however, of Austin's writing on the subject of jurisprudence that was published during his lifetime. The volume stopped short of the main subject; it did not develop his scheme of classification; and it is not surprising therefore that it failed to attract attention or to win favor. To Austin's widow, students of the science of jurisprudence are indebted for the preservation and judicious editing of the portion of his work which he left in manuscript. This she published in 1863, which is the first time that anything like an adequate view of Austin's scheme was accessible to the public, and even that was fragmentary. Still later, Mr. Robert Campbell, of the Scotch and English bar, published an edition of Austin's lectures, in which he made advantageous use of the notes of the original lectures which had been made and preserved by John Stuart Mill, one of Austin's pupils. The following extract from an obituary notice of Austin's widow, appearing in the *London Times* of August 12, 1867, gives an interesting glimpse at their life in London and of their character and position: "Mrs. Austin was descended from the Taylors, of Norwich, a family which has in several generations produced men and women distinguished by literary and scientific ability. She was born in 1793, and she received in her father's house an education of more than common range. In 1820 she married John Austin, then a barrister on the Norwich circuit, and came to reside next door to Bentham and Mr. James Mill, in Queen Square, Westminster.

Although that house could boast of none of the attractions of luxury (for the fortune of its owners was extremely small), it soon collected within its walls as remarkable an assemblage of persons as ever met in a London drawing room. There might be seen a dim and flitting figure of the past, Mr. Bentham, his two disciples James and John Stuart Mill, the Grotes, the rising lawyers of that day whose success has justified the promise of their dawn, Bickersteth [afterward Lord Langdale], Erle [afterward Lord Chief Justice of the Court of Common Pleas], Romilly [later Master of the Rolls], and Senior; and all this wisdom and learning was enlivened in later years by the wit of Charles Buller, by the hearty sallies of Sydney Smith, by the polished elegance of Jeffrey, by the courteous amenity of Lord Lansdowne, and by the varied resources of foreign visitors who found a home by Mrs. Austin's hearth."

It remained for Thomas Erskine Holland, of Oxford, in his work on the "Elements of Jurisprudence," published in 1880, to develop and complete the system which Austin mapped out, and it is to Holland that students may now refer for a concise and adequate exposition of the science of jurisprudence. It is proper to remember, however, the valuable contribution to the subject made by William Markby, judge of the high court of judicature at Calcutta, in his book entitled, "Elements of Law," published in 1871.

It would be out of place for me to occupy your time on this occasion with even an outline of the classification which these writers have presented. Enough has been said to indicate the object and character of their work. They take legal rights as the subject matter of jurisprudence, just as the botanist takes plants as the subject matter of the science of botany, or as the zoologist takes animals as the subject matter of his science, and they arrange and classify legal rights on a logical and scientific basis, just as the botanist arranges and classifies all plants, or the zoologist the animal kingdom, so that a comprehensive view is given of the whole body of the law, which is applicable alike to any and every system of law, whether English or civil, ancient or modern, and so that the relation of each legal right, and of every class of legal rights to every other right, or class of rights, is seen and appreciated.

But in the first place, legal rights, which are the subject matter of the science of jurisprudence, are defined and distin-

guished by the scientific jurist from other rights. A legal right is shown to be "a capacity residing in one man of controlling with the assent and assistance of the state, the action of others." A legal right differs from might, which is the power to execute one's wishes without reference to the aid of the state, and from a moral right, which has behind it, not the power or sanction of the state, but only public sentiment. This view suggests at once not only the difference between moral rights and legal rights, but the desirableness of establishing, so far as possible, a coincidence between them. Having defined legal rights and distinguished them from all other rights, the science of jurisprudence asks how legal rights may be classified scientifically, that is, logically. It shows, first, that a legal right presents four elements: (1) A person in whom the right resides, or who is clothed with the right; (2) in many cases, but not always, an object over which the right is exercised; (3) acts or forbearances which the person in whom the right resides is entitled to exact; (4) a person from whom these acts or forbearances can be exacted—in other words, against whom the right is available. Or, in the terminology suggested by Austin and Holland, the four elements of a legal right are: (1) The person entitled, or the person of inherence; (2) the object; (3) the act or forbearance; (4) the person obliged or the person of incidence. It can be seen at once that a great many modes of classification are possible. I cannot take the time or trespass upon your patience to suggest even a few of them, or to present the arguments in favor of one mode as against another. Let it suffice to say that the classification generally accepted, is that which first divides all rights with reference to the political or non-political character of the persons with whom they are connected, and thus establishes, as the grand divisions of law: (1) International Law, where the persons of incidence and of inherence i. e. the persons entitled and obliged are both states; (2) Public Law, where the person entitled is a state, and the person obliged is an individual, e. g. criminal law; (3) Private Law, where the persons entitled and the persons obliged are both private. Private law is then divided into substantive law, which defines rights, and adjective law, or the law of procedure, which provides for their protection and enforcement. The next subdivision is into normal law and abnormal law, the former dealing with rights as unaffected by any special characteristics of the persons with whom they are connected, and the latter dealing with rights as affected by the

status of the persons concerned, e. g., coverture, infancy, lunacy, alienage, etc. Rights are also divided into antecedent rights, and remedial or secondary rights, the latter always growing out of breaches or infringements of antecedent rights. Finally, all rights are divided into rights *in rem* and rights *in personam*. A moment later I wish to direct particular attention to this classification of legal rights into rights *in rem* and rights *in personam*, not only because it is the fundamental and radical distinction adopted by the Roman jurists, but because I wish to apply an argument based upon that distinction to two or three great cases that have actually occurred in the courts, by way of illustrating the practical utility of the science of jurisprudence, and for the purpose of showing how a lawyer, familiar with the scientific distinction between rights *in rem* and rights *in personam*, might have argued and perhaps have won those cases.

But before proceeding to these particular practical illustrations, permit me to suggest, generally, two or three ways in which the study of the science of jurisprudence is of obvious practical utility.

1. In the first place, no other study affords to a lawyer such an opportunity for mental training combined with the acquisition of knowledge useful in his profession. It is the sort of exercise that a man gets from walking, when he walks, not for the mere sake of the exercise, but to accomplish his business. Students will naturally resort hereafter to Prof. Holland's treatise, rather than to Austin's lectures, as being the more complete and systematic and readable presentation of the subject, but for myself, when I recall the mental exhilaration with which I arose from the reading of Austin, I do not regret that Holland's book had not then been written, and I am ready to endorse the following tribute which John Stuart Mill pays to the master, at whose feet he sat: "No writer," he says, "whom we know had more of the qualities needed for initiating and disciplining other minds in the difficult art of precise thought. Though the merit and worth of his writings, as a contribution to the philosophy of jurisprudence are conspicuous, their educational value as a training school for the higher class of intellects will be found, we think, to be still greater. Considered in that aspect, there is not extant any other book which can do for the thinker exactly what this does. Independently of the demands which its subject makes upon the attention, not merely of a particular profession, but of all liberal and

cultivated minds, we do not hesitate to say that, as a mere organon for certain faculties of the intellect, a practical logic for some of the higher departments of thought, these volumes have a claim to a place in the education of statesmen, publicists and students of the human mind."

2. The study of the science of jurisprudence is now a part of the prescribed course of legal education in England and is being introduced gradually into the law schools of this country. Its principles are adopted, and its terminology is employed, in many standard law books, such as Digby's *History of the Law of Real Property* and the work on *Contracts* by Anson, Blackstone's successor as Vinerian reader at Oxford. So that a lawyer must study the science of jurisprudence, who wishes to keep up with the times, and to be able to read intelligently the books that are coming out, which may, otherwise, prove resistless weapons in the hands of his adversary. Among recent reports of the proceedings of the American Bar Association will be found the report of a committee on classification of the law, adopting the Austinian system, which would be unintelligible to one not familiar with the terminology of the science of jurisprudence.

3. Codification is being pressed vigorously to the front; but how is any man to undertake that great work, unless he is familiar with the basis for a scientific classification and arrangement of the law, and how is the bar to do its part in superintending and directing the formation of a code, and in using it when adopted, unless a knowledge of the science of jurisprudence is widespread?

4. A mere knowledge of cases will not make a great lawyer; and moreover the cases are multiplying so rapidly and their volume is so great, that no lawyer in practice can find time to read even the syllabi of half of them. If a lawyer is to get along with his work at all, he must depend upon a mastery of legal principles; and how can that be acquired so well as by the study of the science of jurisprudence? How can we hope to know the exact boundaries of any legal principle; how can we appreciate its real significance and apply it to the new cases that arise, unless we have a clear and comprehensive map of the entire field? How can we distribute the cases as they come out, and retain them for use, unless we know the pigeon hole to which each belongs? And what sort of a science is it that relies for its classification upon a digest of titles arranged alphabetically according to the whim of

an indexer, whose skill is often measured by the facility with which he can use a paste-pot and scissors, or distribute different faced type attractively for cross reference?

And now for my practical illustration:

Is a charter a contract, within the meaning of that clause of the constitution of the United States which declares that no state shall make any law impairing the obligation of contracts? This is the great question which was presented to the supreme court of the United States, and decided by it, in the famous Dartmouth College case. The decision then made, and so often reaffirmed later, of course settles the question forever in this country, as a matter of actual law, but the conclusion reached by the supreme court, that a charter is a contract, was so much resisted at the time by other courts, especially by the supreme court of Ohio, which refused to follow the decision of the supreme court of the United States, and has been so freely criticised by jurists ever since, and the question, if it were *res integra*, is so interesting in itself, that I have selected it for the purpose of showing how the science of jurisprudence would have dealt with it, by way of illustrating the practical use to which that science may be put in the actual trial of cases. It is "the obligation of contracts" which the constitution protects from impairment by state legislation, but, according to the science of jurisprudence, a grant or conveyance is not a contract, and does not create an obligation. A contract is an agreement. But agreement is a generic term, importing merely proposal and acceptance, mutual assent, the meeting of minds, and, in law, includes all transactions whereby persons may, by that process, mutually affect their legal rights or relations. It embraces, without making a complete catalogue, contracts, grants, and conveyances, gratuitous or upon consideration (for even a gift requires the assent of the donee), marriages and releases. But what distinguishes contract from other forms of agreement? Since all agreements—I use the word henceforth in its legal sense—affect in some way the legal rights or relations of the parties, specific distinctions must be sought in the character of the rights created or the relations established by different kinds of agreement. What is the specific mark of contract? What particular kind of right or sort of relation does it establish?

We cannot think of contract without thinking of an obligor, an obligee, and an obligation; of a promise made by one of the parties to the other, which the promisor is bound to the promisee

to perform. Next to the notion of agreement, that of obligation is essential to the conception of contract. A contract without a resulting obligation of one of the parties to the other, and perhaps of each to the other (bilateral contracts), is a paradox. This truth is illustrated and enforced by the apt language of the constitution. It is the *obligation* of contracts, which the constitution declares shall not be impaired. Without an obligation, there is nothing for the prohibition to operate upon. Manifestly it must be an obligation arising from the contract; one which would not exist but for the contract. And it must be an outstanding obligation, from the performance or observance of which the obligor is not to be discharged. We may therefore define a contract as an agreement which creates a legal obligation between the parties to it; or, as an agreement which establishes the legal relation of promisor and promisee between the parties to it; or, still otherwise, as an agreement which vests in one or both of the parties to it a right, in law, to compel acts or forbearances on the part of the other. And we may affirm that no agreement, which does not generate and leave outstanding, as its results, a legal obligation of one of the parties to the other, can be a contract.

Tested by these rules, is a conveyance a contract? That it is an agreement is conceded. But is it a form of agreement which creates an obligation between the parties? What is the office and effect of a conveyance? Take an example. I own a piece of real estate, which means that I possess the right, as against all the world, to use and enjoy it without unlawful interference, and to transfer it at pleasure. I convey it to you, and you thereby acquire the rights with respect to it, which, before, were vested in me. But you acquire no special right against me, which you do not have against persons generally. After my conveyance, I am no more and no less bound to refrain from interfering with your use and enjoyment of the property, than is the rest of the world; and I am bound in no different way. The duty which rests upon me not to trespass upon the property which I have conveyed to you, is the same duty which I owe you with respect to all your other possessions; it is the same which, before I acquired title, I owed to the prior owner; the same which I, in common with all the world, owe to all owners of property. It is a universal duty not resting on agreement at all, but imposed by the general law of property. My conveyance creates no special obligation against me, and, therefore, cannot be a contract. The

sole office of a conveyance is to transfer rights already existing; that of a contract, is to create rights not otherwise existing.

Now, according to the science of jurisprudence, all rights, as I have said, are divided into two classes; rights *in rem* and rights *in personam*. By rights *in personam*—abbreviated from *in personam certam*—is meant rights which avail against some particular person or persons; by rights *in rem*—*in rem* being used, not literally, but as an adverbial phrase, in the sense of generally,—is meant rights which avail against persons generally, that is, against the world at large. Every contractual right is a right *in personam*. It is a right of the promisee against the promisor and against no one else. The rights of property, of personal liberty and security, of immunity from defamation, are, on the other hand, all instances of rights *in rem*. My right not to be libeled or slandered, not to be assaulted or unlawfully imprisoned, my right to use and enjoy my property without interference, are all rights, not against one person more than against any other, not against any particular person, but against all persons. The duty which correlates to a right *in rem* is a duty which rests alike upon all persons. There is no special tie between the person in whom the right resides, and any other particular person or persons. An obligation, on the other hand, as distinguished from a duty, implies a special bond—*vinculum juris*—between particular persons, and applies only to the duty which correlates to a right *in personam*.

The office and effect of a conveyance is simply to transfer the rights *in rem*, which constitute property, from the grantor to the grantee; and the grantor is thereafter, with respect to the grantee, simply in the situation of one of the world at large, against whom the grantee's newly acquired rights *in rem* avail. The mere transfer of rights *in rem* cannot, of course, vest in the transferee rights *in personam*, or anything else than rights *in rem*. By a conveyance, therefore, the grantee acquires no right *in personam* against the grantor. But without a right *in personam* there can be neither contract nor obligation. The conclusion of the science of jurisprudence, therefore, is that a conveyance is not a contract.

But even if we improperly call a conveyance a contract, and the duty which thereafter rests upon the grantor with respect to the property conveyed, an obligation, it is not an obligation which is created by the conveyance, or by agreement at all, but by the

general law of property. And not being an obligation of a contract, that is, created by a contract, it is not within the constitutional prohibition, which relates only to the obligation of contracts.

Frequently representations are made, or, as in the case of warranty deeds, contracts are entered into, simultaneously with and incidental to a conveyance, from which arise rights and obligations quite independent of the conveyance itself, and which must not be confounded with the conveyance proper. A grant, in the sense of an original conveyance from the state, does not differ in any essential respect from a secondary conveyance. Its effect, like that of a mesne conveyance, is simply to vest in the grantor the rights *in rem* constituting property. This one distinction may be noticed, however. A conveyance never creates rights, while a grant from the state, as in the case of a corporate franchise, patent right, copy-right, may create rights, but they are always rights *in rem*.

Analogous reasoning discloses the distinction between contracts and other forms of agreement, aside from grant and conveyance. Marriage is an agreement, establishing peculiar legal relations between the parties, but the force of the agreement is spent in effecting the relation. The rights and obligations incident thereto are created by the general law of husband and wife, entirely independent of agreement, and, for the most part, beyond its control. Those rights are rights *in personam*, and the corresponding duties, are obligations, but they are rights and obligations which are neither created nor prescribed by the agreement, as is invariably the case in contract, but independent of it.

The foregoing is an outline of the argument which a lawyer familiar with the science of jurisprudence might have made, and perhaps successfully, in the supreme court of the United States, to show that a charter is not a contract within the meaning of the clause of the federal constitution referred to. Let us see how the question was dealt with by the judges of that court, and how they came to confound grant and contract. *Fletcher v. Peck*,¹ is the first case in the supreme court of the United States involving the clause of the constitution prohibiting laws impairing the obligation of contracts. The state of Georgia, having made a grant of lands, afterwards, upon a claim that the grant had been obtained by fraud, passed an act annulling and rescinding the first convey-

¹ 6 Cranch, 87 (1810).

ance, and asserting the right of the state to the land. The defendant below, a purchaser from the original grantee, had thereafter conveyed to the plaintiff with covenant that title to the premises had been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia. The action was for alleged breach of this covenant. Chief Justice Marshall first discusses the validity of the annulling act, without reference to the constitutional prohibition. He states the question to be, whether a legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall by itself be deemed sufficient: "Is the power of the legislature competent," he asks, "to the annihilation of such title, and to a resumption of the property thus held?" He answers: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of legislative power, is well worthy of serious reflection. . . . The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power." "But Georgia," he continues, "is a member of the Union, subject to the limitations of the constitution," and thereupon he proceeds, in the second place, to consider the validity of the annulling act in view of the prohibition of the constitution against laws impairing the obligation of contracts. Having discussed the question in that aspect, he announces the conclusion of the court, as follows: "It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, *either by general principles which are common to our free institutions*, or by the particular provisions of the constitution of the United States, from passing a law, whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

Mr. Justice Johnson, concurring in the judgment but delivering a separate opinion, says: "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things,

a principle which will impose laws even on the Deity. . . . I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision of the constitution of the United States, relative to laws impairing the obligation of contracts." Notwithstanding Chief Justice Marshall's opinion upon the point, the case does not necessarily decide that a grant is a contract. The judgment can be supported, and by Mr. Justice Johnson is declared to be supportable only upon the ground that, without express constitutional prohibition, the right of property, in a free government, is inviolate. The case came into the supreme court on error from the circuit court, and a question under the federal constitution was, therefore, not necessary to the jurisdiction of the supreme court. But the Dartmouth College case,² which was on error to the superior court of the state of New Hampshire, necessarily decides that a grant is a contract. A federal question was essential to the jurisdiction of the supreme court; and the only one involved in the case was whether the act of the New Hampshire legislature affecting the charter which had been granted to the trustees of the college, was in conflict with the prohibition of the federal constitution against laws impairing the obligation of contracts. Webster's published correspondence and Mason's brief in the New Hampshire court—he did not argue the case in the supreme court—disclose that they appreciated the distinction between a grant and a contract, and that they hesitated about the claim that the grant of the charter was a contract within the protection of the constitution. Mason's first and principal point, to which he devotes three-fourths of his brief, is that the act of the legislature, complained of, was not within the general scope of legislative power. In his letter of April 28, 1818, to Mason, Webster says: "The question which we must raise in one of these actions is whether, by the general principles of our government, the state legislatures be not restrained from divesting vested rights? This, of course, independent of the constitutional provision respecting contracts. On this question I have great confidence in a decision on the right side. This is the proposition with which you began your argument at Exeter, and which I endeavored to state from your minutes at Washington. The particular provisions in the New Hampshire constitution no doubt strengthen this general proposition in our case; but, on general principles, I am very confident the court at

² 4 Wheat., 518 (1819).

Washington would be with us." And in his letter of December 8, 1817, to Judge Smith, Webster says: "It is our misfortune that our cause goes to Washington on a single point. I wish we had it in such shape as to raise all the other objections, as well as the repugnancy of these acts to the constitution of the United States. I have been thinking whether it would not be advisable to bring a suit, if we can get such parties as will give jurisdiction, in the circuit court of New Hampshire. I have thought of this the more from hearing of sundry sayings of a great personage [Marshall]. Suppose the corporation of Dartmouth College should lease to some man of Vermont (e. g., Marsh), one of their New Hampshire farms, and that the lessee should bring ejectment for it. Or suppose that the trustees of Dartmouth College should bring ejectment in the circuit court for some of the Wheelock lands. In either of these modes the whole question might get before the court at Washington."

But although, in the Dartmouth College case, the question, whether a charter is a contract, was reargued, and in the opinions—particularly that of Mr. Justice Story—somewhat discussed upon principle, the judgment of the court proceeded mainly upon the ground—mistaken, I submit—that it had already been decided in *Fletcher v. Peck* that a grant is a contract. Let us examine the grounds for that opinion, as stated in *Fletcher v. Peck*, by Chief Justice Marshall. He says (page 136): "In considering this very interesting question, we immediately ask ourselves what is a contract. Is a grant a contract? A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and

those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyance. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected."

But it is not true, as suggested in this argument of Chief Justice Marshall, that a grant is an executed contract. A grant may be made pursuant to, i. e., in execution of, a contract; so may a journey be undertaken or a machine built, in execution of a contract. But the grant is no more an executed contract, than is the journey or the machine. Nor is it true that a party is always estopped by his own grant. A grant does not *ipso facto* work estoppel at all. It is only when it amounts, under all the circumstances, to an assertion of title, that it works estoppel, and the estoppel is, not to dispute the grant, but to deny such assertion of title. Chief Justice Marshall's third and last ground for his conclusion is equally open to dispute. It was not at all strange that the constitution should protect an executory contract while leaving an absolute conveyance unprotected. An absolute conveyance, as the chief justice had himself just shown on the preceding page of his opinion, needed no constitutional protection; it was protected by general principles of law under which, in all free governments, private property is inviolate, a belief which was so generally and firmly entertained that it was not thought necessary to insert in the constitution, as originally adopted, a declaration of the great cardinal principle that no man should be deprived of life, liberty or property without due process of law. That the contract clause of the constitution is not in fact necessary, and was not at the time deemed by the framers of the constitution to be necessary for the protection of vested property rights, and was not inserted therefore for that purpose, is indicated by the following passage from the opinion of Mr. Justice Story,³ in the Dartmouth College case itself:

"Was it ever imagined," he says, "that land, voluntarily granted to any person by a state, was liable to be resumed at its own good pleasure? Such a pretension would, under any circum-

stances, be truly alarming, but in a country like ours, where thousands of land titles had their origin in gratuitous grants of the state, it would go far to shake the foundations of the best settled estates. And a grant of franchises is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation, when the grant was complete, and accepted by the grantees, it involved a contract that the grantee should hold, and the grantor should not resume the grant, as much as if it had been founded upon the most valuable consideration."

The occasion for this clause of the constitution, especially prohibiting laws impairing the obligation of contracts, is found in the history of the revolution, and the repeated acts of legislation in the different states during that period, by which the obligation of private contracts, with respect to time and mode of payment, was impaired.⁴

Many grants, *ex necessitate* all gratuitous grants, including the very grant before the court in the Dartmouth College case, are not even made in execution of a prior contract. In daily life, a large proportion of the transfers of real and personal property are made without prior contract therefor. There may be preliminary questions and proposals, but the transfer itself is often the first and only agreement reached; there is, preceding that result, no moment of time when either party is bound to the other to give or take.

The real distinction recognized by the science of jurisprudence between grant and contract is twice pointed out by justices of the supreme court of the United States. In *Fletcher v. Peck*,⁵ Mr. Justice Johnson says: "There can be no solid objection to adopting the technical definition of the word 'contract' given by Blackstone. The etymology, the classical signification, and the civil law idea of the word, will all support it. But the difficulty arises on the word 'obligation,' which certainly imports an existing moral or physical necessity. Now, a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done."

And in *Charles River Bridge v. Warren Bridge*,⁶ Mr. Justice

⁴ 11 Peters, 572, 573.

⁵ 6 Cranch, 143, 144.

⁶ 11 Peters, 573.

McLean says: "If it had not been otherwise laid down in *Fletcher v. Peck*, I should have doubted whether the inhibition did not apply exclusively to executory contracts. This would have arisen as well from the consideration of the mischief against which this provision was intended to guard, as from the language of the provision itself. An executed contract is the evidence of a thing done, and, it would seem, does not necessarily impose any duty or obligation on either party to do any act or thing. If a state convey land which it had previously granted, the second grant is void; not, it would seem to me, because the second grant impairs the obligation of the first, for in fact it does not impair it, but because, having no interest in the thing granted, the state could convey none. The second grant would be void in this country on the same ground that it would be void in England, if made by the king. This is a principle of the common law, and is as immutable as the basis of justice. It derives no strength from the above provision of the constitution, nor does it seem to me to come within the scope of that provision. When we speak of the obligation of a contract, the mind seems necessarily to refer to an executory contract; to a contract under which something remains to be done, and there is an obligation on one or both of the parties to do it. No law of a state shall impair this obligation by altering it in any material part."

Illustrations of the practical application of the principles of the science of jurisprudence might be multiplied indefinitely. It is enough to be assured that the science, resting, as it does, upon the simple application of logic to the law, and therefore upon the sure foundations of the law itself, cannot fail of recognition in the courts, and must develop the principles of the law, as well as the mind of the student who gives himself to its study.

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NOTES.

SUPREME COURT rule No. 52 was amended July 26, 1893, to read as follows:

RULE 52. The clerk shall be entitled to the sum of six dollars upon entering any case in the supreme court, which amount shall be in full for all fees in such case: *Provided*, that an additional sum of two dollars shall be paid to the clerk upon the entry of any motion upon the motion docket, except in cases of mandamus where the motion fee shall be four dollars.

The foregoing fees may be taxed by the prevailing party where costs are allowed by order of the court.

The clerk shall also be allowed the sum of fifteen cents per folio for certified copies of any entries or papers in any suit or proceeding when required for any other purpose than for one connected with the progress or disposition of such suit or proceeding.

The clerk's fees for all proceedings relative to the admission of any person to the bar, including the proper certificate, shall be the sum of three dollars. *As amended July 26, 1893.*

THE supreme court in a recent case,¹ were called upon to decide a novel question upon the statute of limitations. Proceedings for execution sale had been commenced before the right to bring suit upon the judgment had expired by limitation, but the sale took place after it had expired. It was held that any proceed-

¹ Ludeman, et al., v. Hirth, (Grant, J.), June.

ings, authorized by law to enforce a lien instituted before a right of action upon the judgment is barred, are valid, and a sale in pursuance thereof legal, though it takes place more than ten years after rendition of judgment. This is, without doubt, the wisest construction of the statute, for, as the court say: "The lien remains in force until the statute of limitations has barred any right to proceed to foreclose it. The record of a levy is notice to every one of its existence, and is equivalent to actual possession of personal property taken under execution. Publications of the notice of sale before the right of action is barred is an open assertion of the non-payment of the judgment. The debtor is presumed to know that the lien is being enforced. If the judgment has been paid, or if he has lost any right by the failure to proceed earlier to a sale, for which the judgment creditor is responsible, the courts are open to him to restrain the sale."

AN editorial in the June number of the *LAW JOURNAL* relative to the method of transacting business in the supreme court of this state has provoked considerable discussion among the profession. The *JOURNAL* may have erred in stating that there was a time when the judges gathered about a consultation table, and discussed the cases before assigning them to particular judges to be written out. The *JOURNAL* did not make this statement carelessly but upon what any one would be warranted in regarding as high authority. Since this article appeared, a higher authority has demonstrated to us that the present practice of the supreme court is exactly the same as that pursued in the days of Cooley, Campbell and Christiancy, to which allusion was made. The *JOURNAL* still maintains that a consensus of the opinions of practicing lawyers places the Michigan reports of 1892 below those of ten or twenty years ago, but we may have been wrong in attributing the cause to the methods of doing business. That old court made many blunders, but the unsurpassed excellence of a majority of their decisions has thrown a luster over our early judicial history which time cannot dim. Since then, however, the work of the supreme court has gone on increasing year by year, until the judges are completely overburdened. Willing to sacrifice the conveniences which a residence outside of Lansing carries with it, the judges fought hard for the new law which requires them to live at the capital. This will allow them at least one more day each week for consultation—the day heretofore taken up in traveling to and from their homes. With such an able, conscientious bench, after the new law goes into effect, we shall expect the Michigan reports to be restored to the high place they once occupied, by the side of the federal decisions, and of those of Massachusetts, Pennsylvania, and New York.

STATE BAR ASSOCIATION.—The lawyer must enjoy a vacation, we presume, as well as those engaged in other occupations,

and that is the reason, perhaps, that so little interest is manifested at present in the affairs of the state bar association. If the activity of the profession, however, in matters relating to legal reform, to legal ethics, and to the maintenance of a higher standard of fitness among the new members of the bar, is to be measured by the promptness with which the lawyers of the state perform their first duty or primary obligation as members of the state bar association, it is to be feared that the once proud prestige of the profession and its boasted function as conservator of the rights of the people are fast becoming things of the past, in our own commonwealth, at least. The fact that less than one-third of the members of the state bar association have discharged their almost insignificant pecuniary indebtedness to the association by the payment of dues, is not a very encouraging indication of the interest that is taken in the work of the association.

The payment of dues, we think, is a very accurate register of the attitude of the members of the state bar towards the association and its objects. The dues are a trifle more than one-half the dues of nearly every other state bar association in the country, yet more than two-thirds of the members of the Michigan State Bar Association would rather lose their membership in the association than retain it by the payment of the dues. If the section of the constitution providing for the expulsion of members two months in arrears for dues, should be enforced on August 6, the membership of the state bar association would be reduced to about eighty active and interested members. This is a painful truth, but we believe that this state of affairs is simply due to the fact that the members of the association do not appreciate the importance of placing the association on a firm footing financially so that there may be sufficient funds in the treasury to prosecute the new lines of work to which the association, through its executive officers and committees, is now devoting its energies.

We are laying especial stress upon this matter because we believe that it vitally affects the utility, not to speak of the existence, of the association. The officers of the association, through *THE MICHIGAN LAW JOURNAL* as the best medium of reaching the members, earnestly desire to urge upon those who have not paid their dues to do so at once.

To be sure, this is the vacation season, and the lawyer is seeking needed rest and recreation, but according to our conception of the real duty of a member of what was once proudly called "the noblest of professions," this is just the time for the lawyer to take a bird's eye view of the condition of his profession, particularly in his own state, to determine for himself whether it is meeting the lofty ideal of our forefathers who did much to ennoble the profession, and especially to inquire whether he himself has fully discharged his obligation to the state as a member of the bar. We cannot disguise the fact that the standard of the pro-

fession has been greatly lowered during the last half or even quarter of a century. This is so painfully apparent that it is not even open to debate. So it is that we say that the vacation season is an opportune time for the lawyer to consider these matters and to make up his mind to spare a portion of his time from his active business to the work which has been inaugurated by the state bar association, a work that no other organization, nor any individual, can undertake and successfully prosecute. As was forcibly pointed out by both Ex-President Cahill and President Durand, the state bar association cannot hope to become an effective organization unless it numbers among its members a large majority of the practicing lawyers of the state. The officers of the association are handicapped in their efforts to increase the membership by the failure of those who hold membership at present to pay their dues.

To those doubters who question the ability of such organizations to effect anything of value to the profession or the people, we can point to the New York State Bar Association as an illustration of what perseverance can do. In its reorganized condition our state bar association is in a position to do very effective work, provided it is backed by a large proportion of the lawyers of the state.

LAW SCHOOL NOTES.

PROF. E. F. JOHNSON, EDITOR.

HENRY C. WALTERS, ASSISTANT.

A special feature, and one which has been greatly needed, will be inaugurated in the department this coming year. It is the practice court. It is intended, so far as possible, to make this court of the highest practical benefit to the students. It will be under the control of the faculty and in the special charge of some one of the faculty who is to hear the cases, prepare statements of fact, and give the student the benefit of actual practice so far as can be done. It is believed, and this belief is founded upon some experience during the past year, that students in the law can be thoroughly prepared for the actual work of the court room during their two years' work here. One of the strong objections to studying law in a law school, has been that the schools could not teach anything but theory. This objection will be thoroughly met by this practice court.

Chief Justice Waite said: "The time has gone by when an eminent lawyer, in full practice, can take a class of students in his office and become their teacher. Once that was practicable, but now it is not. The consequence is that law schools are now a necessity." Blackstone said: "Making due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer, thus educated to the bar, in subservience to attorneys and solicitors, will find that he has begun at the wrong end." "A young man will learn more, according to my experience, in three months in a law school, than in one year in a law office." Said Hon. R. A. Harrison: "It is a fact that a large percentage of those who are admitted to the practice of the law in America to-day, come from our schools of law. The study of the law in law schools under the direction of men who 'pursue the study of the law rather than the gain of it' certainly tends to a higher code of professional ethics, and at the same time to a more careful study of the law as a science than is apt to be made in the law offices, where each particular question is investigated with some reference to the compensation which should follow. Law should be taught as a science and not as a mere trade."

It is now admitted by all well trained lawyers, that the best place to study law is in a law school. Why is it not also the best place in which to train the young lawyer in the trial of cases and in the enforcement of court rules of practice? Another and one of the great advantages afforded by this practice court, is that it affords the student the best possible school for the cultivation of forensic eloquence, and of correct thinking and speaking while upon his feet. Such an experience every young man ought to have before coming to the bar. It is invaluable. If he begins his practice without this discipline he cannot be certain that timidity and embarrassment will not overcome him at the outset of his career. Some of the best thinkers who enter our schools are utterly unable to make an argument while upon their feet. This practice court will certainly be of incalculable value to them and also to the profession for it will be benefitted by the expression of his correct thinking in after years. The first efforts of a

young lawyer are likely to have a telling influence upon his after life. It is not every young man who can brave ridicule, defeat and mortification until repeated trials will have conquered his stammering expressions or his timidity. What a blessing this practice court will be to him, so that he may have an opportunity, not in the presence of a public audience and experienced members of the bar who are looking for points to criticize, but in the presence of an experienced instructor whose duty it is to help and direct and also surrounded by classmates and friends whose presence is of the greatest assistance. The advocate must acquire self-reliance. One of the best ways to acquire this is by trying his powers until he is certain of them.

The "Boomerlacker" will be a bulletin issued three times a year, and will be devoted to news relating to members of the '93 law class. The news of the class will be reported to the following persons, who will represent the districts assigned to them: P. M. Troy, Washington and Oregon; W. T. Aggler, California; E. S. Cunningham, the south; C. B. Stevens, Utah; A. G. Thompson, Kansas and Colorado; E. L. Johnson, Nebraska; U. S. Sykes, Iowa; L. G. Grundy, Illinois; E. T. Martin, Chicago; H. L. Hegner, Pennsylvania; J. W. Murdock, Wisconsin, Minnesota, North and South Dakota, Montana and Canada; J. S. Phillips, New York and the New England states; G. Kuiper and E. D. Frazer, Michigan; W. H. Evans, Ohio. The "Boomerlacker" will be published by W. H. Evans, at Columbus, Ohio. The first number will appear about November 25, 1893. The subscription price will be 50 cents per year. All seniors desiring to subscribe for this class publication are requested to report to their district correspondent at once, or to W. H. Evans, and give their post office address, and pay 10 cents to defray expenses of the first issue, the rest of the subscription to be paid after the first number has been delivered. The "Boomerlacker" will also contain University news.

On the occasion of Prof. Griffin's last lecture to the class of '93, he said a great many things which the members of the class will do well to hold in their memories. He said: "You are all mature in years; you are familiar with the personal duties and obligations of life, and I cannot imagine the necessity of urging upon you the maintenance of high ideas and lofty purposes. I cannot imagine that you can hope for deserved and lasting success without a high standard of moral excellence, a continued presence of culture and refinement. Read the 'sermon on the mount.' Many of you are familiar with it; some of you, I fear, have forgotten it. Read it carefully; read it at morning; read it at night; read it daily. It will enable you to solve every complication of life, whether it be social, domestic, personal or professional; and it will at last teach you the wide difference between building your house upon the rock and building it upon the sand."

The '93 class will hold a class reunion on the 21 and 22 of February, 1900. The gathering will be held in Ann Arbor, and will begin with a reception on the evening of the 21st. It will be continued on the 22nd, ending with a banquet in the evening. The secretary-treasurer will, with the co-operation of the members of the class, keep a record of their whereabouts, in order that he can notify them of arrangements for the reunion. The president, A. W. Jefferis, and the vice-president, G. S.

Kistler, have been continued as class officers. Other officers appointed to carry out the affair are: J. W. Murdoch, secretary-treasurer; J. S. Phillips, alternate secretary-treasurer; P. M. Troy, A. McIntyre, F. W. Walker, executive committeemen; S. H. Seccombe, R. T. Waddle and G. Kuiper, alternate executive committeemen.

The commencement for the year '93 is now a thing of the past. The six hundred and fifty students, who for the past year have acted a busy scene in and about the law building are gone. The law library in which you could, at almost any time in the day from eight o'clock in the morning until five o'clock in the afternoon, find from one to three hundred students, is almost deserted, save a few who are staying here over the summer for extra reading.

Perhaps at no time during the history of the law department has there been more earnest work done by the students than during the past year. They have been quizzed more, and have been required to do more hours' work than ever before. The dean insists that those who graduate from the law department shall not only have read the law, but shall know the law. It is expected that more text-book work will be added next year.

J. Baird, '93 law, who was a recognized leader of his class in all the class affairs as well as in his class work, is the leading candidate for clerk of the courts of Wood county, Ohio. His friends say there is no question of his nomination and election. This position pays about \$4,000 per year.

From present indications, the attendance in the law department for the coming year will be larger than ever. The librarian says he is receiving more applications than ever before, having already received and answered more than one thousand.

Judge McAlvay, of Manistee, was among the many alumni of the U. of M. who returned to visit their *alma mater* during commencement week. The judge was a member of the literary class of '68 and law class of '71.

H. Ward Hicks, '89 law, who is practicing his profession at Monett, Missouri, has been visiting Ann Arbor for a few days. He is a prominent candidate for district attorney for the western district of Missouri.

Prof. Champlin delivered the annual address before the senior law class this year. His address was full of excellent advice to the young lawyer. The class was highly pleased with the lecture.

Charles E. Temple, law, '82, of Grand Rapids, is engaged in the preparation of a work on "Law of Municipal Bonds." He is an authority on this subject.

The law class of '93 will be remembered, by the law faculty, as one which was composed of very strong men, and not only for that, but also

for the high character of their work while here as students. Many of this class have been very fortunate in being able already to effect excellent business arrangements.

Everett E. Ellinwood, law, '90, who located at Flagstaff, Arizona, has recently been appointed attorney in that district by President Cleveland.

A. E. Gibson, also '93 law, has made arrangements with the Hon. A. J. Sawyer, of Ann Arbor, and will be in the office with him.

T. W. Hughes, '92 post graduate law, visited the department commencement week. He is located at Pontiac.

W. H. Evans, '93 law, will take a post graduate law course at the law school of the Ohio University.

MONTHLY RECORD OF SUPREME COURT DECISIONS.

ADVERSE POSSESSION—Degree of cogency and clearness as to proof of adverse possession—Elements. *Judson v. Duffy*. Hooker, C. J., Long and Grant, JJ., concurring on all points; McGrath and Montgomery, JJ., concurring in the result, but on the ground that possession was interrupted. Judgment reversed.

ARREST, ILLEGAL—What are proper grounds for arrest without a warrant—Probable cause for belief of felony—Obstruction of street railway cars—How Stat., 9274 and 9275. *White v. McQueen*. Grant, J. Judgment set aside and new trial ordered.

ATTACHMENT, fraudulently contracting obligation as ground for—Effect of fraudulent representations to accommodation endorser—What agreements to allow attachments non unconscionable. *May v. Newman*. McGrath, J. Order vacating attachment set aside.

BONA FIDE HOLDERS—When knowledge inferred—Failure of consideration. *Fink v. Chambers*. McGrath, J. Affirmed.

BOND—Conditioned to take out writ of error—Effect of failure to take out writ—Bond under seal imports consideration—Measure of damage upon failure to take out writ—Action against survivors of one of several defendants. *Healey v. Newton*. McGrath, J. Reversed.

BONDS—Fraudulent issue—Effect of charge of fraud and collusion made in sworn petition, on information and belief—Issue of bonds not properly authorized—Innocent purchasers of bonds. *Steadley v. Pailthorp*, circuit judge. Mandamus denied.

CONTRACT—Principal and agent—"Fruit-tree orders," when must be assented to by agent of nursery company to constitute binding contract—Recoupment and set-off—Admissibility of evidence to show other party in interest. *Brown v. Herbert*. Hooker, C. J. Reversed and new trial granted.

DAMAGE—Malicious shooting of a dog—Value of a dog—Malice and exemplary damages. *Tenhopen v. Walker*. Long, J. Affirmed.

DEEDS—Mistake in description—Effort to set aside. *Darling v. Jewell*. Long, J. Affirmed.

DIVORCE—Setting aside of order vacating divorce—Rights of chancery courts to purge record—Who entitled to have decree vacated—Who to be made parties. *Carlisle v. Carlisle*. McGrath, J. Appeal from Wayne. Affirmed.

EJECTMENT—Estoppel—Adverse possession, what constitutes—When question for jury. *Pendill v. Marquette Co. Agricultural Society*. Hooker, C. J. Reversed and new trial ordered.

ESTATES, settlement of, when questions concerning, to be determined in probate courts rather than in chancery courts—Effect of separate agreement upon widow's allowance after parties have again co-habited. *Knapp v. Knapp*. Hooker, C. J. Affirmed.

FRAUDULENT ASSIGNMENT—Statutory assignment—Want of consid-

eration to mortgage given at time of assignment. *Abbott v. Chaffee*. Long, J. Affirmed.

LIEN—When vendor's lien upon real estate presumed to be waived by conduct of parties—Sufficiency of consideration for deed. *Huston v. Waldron*. Grant, J. Affirmed.

MORTGAGE—Husband and wife, tenants in the entirety—Wife's power to make contracts, statutory—Mortgage cannot pass an after acquired title. *Naylor v. Minock*. Montgomery, J. Affirmed.

NEGLIGENCE—Due care—Implied warranty in sale of meat—Questions for jury. *Croft v. Parker, Webb & Co.* Long, J. Reversed and new trial.

NEGLIGENCE—Whether driver of street car should stop car before ordering boy to get off—Degree of care required where boy a mere child—Damages and the value of services of child—Effect of writ of error sued out before judgment entered. *McCahill v. Detroit City R'way Co.* McGrath, J. Reversed and new trial.

PARTNERSHIP—Power of partner to execute chattel mortgage to pay partnership debts—Such mortgage valid against exemptions provided by How. Stat., sec. 7686. *Robards v. Waterman*. Grant, J. Affirmed.

PARTNERSHIP—Profit-sharing, as evidence of—As to third persons—Test, the question of intent=Sharing of losses. *Dutcher v. Buck*. McGrath, J., Long and Grant, JJ., concurring. Reversed. Dissenting opinion, Montgomery, J., Hooker, C. J., concurring.

PLANK ROAD COMPANIES, right to maintain tollgates within villages—When statute compelling removal of toll-gates unconstitutional. *Village of Highland Park v. Detroit and Birmingham Plank Road Co.* Hooker, C. J. Reversed.

PLEADINGS—Libel—When published articles barred by statute—A number of articles declared upon in one count—Amendment of declaration with one article in each count—Joining all the counts in one declaration. *Randall v. Gartner*, circuit judge. Long, J. Mandamus granted.

POWER OF ATTORNEY—Strictly construed—Construction of, where given by husband and wife, as to dower interest. *Penfold v. Warner*. Hooker, C. J. Affirmed.

RAPE—What constitutes consent—Testimony, *res gestæ*—Aiding principal defendant—A reasonable doubt. *People v. Flynn*. Hooker, C. J. Affirmed.

STAY OF EXECUTION—Effect of filing transcript of judgment of justice court in circuit court after expiration of five days from rendition of judgment and before stay of execution entered with justice.—How. Stat., 6947, 6993. *Hitchcock v. Hosmer*, circuit judge. Montgomery, J., Hooker, C. J., and Grant, J. concurring; Long and McGrath, JJ., dissenting. Mandamus granted.

SUNDAY LAWS—Promissory note executed in Michigan and made payable in Ohio—By what law its validity is determined. *Arbuckle v. Reaume*. Long, J. Reversed and new trial.

TROVER—Evidence admissible in defense to action for, as part of *res gestæ*—When objectionable language or ambiguous statements in instructions to jury not ground for reversal may fairly be assumed to have been correctly understood. *Davidson v. Kobb*. Hooker, C. J. Affirmed.

CORRESPONDENCE.

JUDGE COOLEY MISINTERPRETED.

Editors of Michigan Law Journal:

GENTLEMEN:—I was quite surprised on taking up the June number of your journal, by finding on page 209 a reference to a comment in the *New York Law Journal* upon my article in your April number on the "Power to Amend the Federal Constitution." I have not seen the number of the *New York Law Journal* from which you quoted, but if I get the correct idea of its drift, the writer is of the opinion that there are certain implied restraints upon the power to amend the federal constitution which are as inflexible as the one specified in terms therein. But he seems to understand that in my article I advanced a view differing from this. I must have been very unfortunate in the use of language, or he has read me carelessly, for the leading purpose of my article was to express a decided conviction that restraints of an implied nature do exist, and that the notion that any amendment whatsoever which three-fourths of the states may unite in must stand provided it is not prohibited in express terms, is entirely unfounded.

On page 117 and the pages which follow, I thought I had shown this in terms as positive and clear as it was possible for me to employ; and as I now re-read what you published from my pen, I still think that my views to that effect are expressed in terms that are entirely certain and unambiguous.

I suggested certain amendments which are not forbidden in terms in the constitution, and then raised a question whether it would be competent to make them simply because they were not forbidden, and proceeded to state that an amendment as I understand it, in the very nature of the case, "must be in harmony with the thing amended, so far at least as concerns its general spirit and purpose. It must not be something so entirely incongruous that, instead of amending or reforming it, it overthrows or revolutionizes it;" and, giving an instance, I said that "to convert a democratic republic into a government ruled by a privileged aristocracy or by a king, through an amendment of the constitution, was simply an impossibility. The change would not be an amendment but a revolution."

The other instances given in the article, of amendments which would be foreign to the spirit and purpose of the constitution itself, I think I made quite clear in what I said, could not be made for precisely the reason here given. They would be revolutionary in their character and not amendatory.

Very respectfully yours,

THOMAS M. COOLEY.

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THE ADMINISTRATION OF JUSTICE IN THE UNITED STATES OF AMERICA IN CIVIL CASES.

THOMAS M. COOLEY.

PRELIMINARY.

The paper which follows was prepared by the writer on an understanding that it was to be read at a congress composed of jurists gathered at Chicago from this and many foreign countries, who would naturally be interested in the methods prevailing among the different nations of the world for the protection of rights and the redressing of wrongs by means of civil remedies, and who might perhaps find it useful to them in making their comparisons, and in estimating the merits of respective systems which would there be set forth and explained. This being the sole purpose, the field to be occupied was obviously a narrow one, and the writer has not felt at liberty to wander beyond it for the purpose of criticising existing methods here or elsewhere, or of suggesting reforms, as he might do if he were addressing a gathering composed exclusively of American jurists, or of those interested in the practical operations of American law. To such a gathering he would understand very well that much of what is here said would appear commonplace, unless accompanied by practical suggestions having in view the improvement of the remedial laws under which justice is now administered in the United States.

Whoever would make himself familiar with the administration of justice in any country needs first of all to understand the source of its laws, and how far these were the outgrowth of the habits, desires and needs of the people themselves, or, on the other

hand, were imposed on their obedience as definite rules of action by some superior and perhaps arbitrary authority. The difference in the two cases, as regards the conduct of the people under the laws which protect their rights and govern their daily intercourse is instinctively perceived by every thoughtful person; the code which the people themselves have gradually and imperceptibly brought into existence, and which only expresses the common reason of the people, will be cheerfully respected and obeyed, while another in theory equally just and right will produce in its enforcement continual unrest and disquietude.

The English colonists who established themselves in the American wilderness in the seventeenth and eighteenth centuries had in doing so no purpose to sever their relations to the public institutions of their mother country, and least of all to those which defined their rights as individuals and as members of the social and political community. They came to America as loyal subjects of the king of Great Britain, bringing with them the institutions to which they were accustomed, and especially the great body of the common law of England, which had for many centuries been gradually growing and expanding, to meet the needs for protection of domestic and business rights and interests, and upon which they were accustomed to rely in the confident expectation that they would find in its definite rules a remedy for any wrong they were likely to sustain at the hands of their fellow subjects or of those who might be entrusted with the public authority. Their settlements in America were therefore faithful colonies of the mother country, and the settlers looked to the home government for protection against foreign aggression, expecting at the same time to respond when called upon, to give aid in maintaining the honor, the dignity, and the importance of the crown. The common law of England was a cherished inheritance. It was the outgrowth of the ideas and customs of a freedom loving and industrious people, and in their new home they needed no legislation to give them its benefits, for it belonged to them as a part of their very nature. The colonial legislation was for the most part limited to such matters as were peculiar to their situation, and they undertook no general revision of the unwritten code which had been theirs when they landed in the wilderness, and whose general provisions were familiar to them all. It is true that some of them had left the country of their birth because of encroachments by the state church upon what they esteemed their liberty of

thought and action in religious matters, but the burden of a state church was not laid upon them by the common law, and was rejected in their emigration, while the common law in what they understood to be its purity was unhesitatingly made the basis of their civil rights, and was administered in all their primitive jurisdictions.

For the most part the same common law, to some extent indeed modified by the customs of the people, and in some degree also, where it has been found for any reason or in any particular to be wanting in justice or in comprehensiveness, changed by remedial statutes in particular states, has remained the law of the land since the colonies asserted their independence and threw off the British authority. It is upon this common law therefore as perpetuated in the several states, that their citizens still rely for the definition of fundamental rights, and for a general indication of the remedies to which they may resort for redress when wrongs are suffered. Louisiana, which was a French colony when acquired by purchase, and which had a system of its own founded upon the civil law, has been an exception. In other states also which have at some period before admission to the Union been under foreign jurisdiction, there are also to be met with exceptions to the universal prevalence of the common law, but in no case are these numerous or very important. In the mining states codes of mining law have sprung up to provide for the exigencies of the mining business in its early days, but these are taken notice of and their rules administered by the same courts which administer the general body of the common law. The special codes in their origin differ mainly from the common law in the fact that while that law was the growth of ages, the mining codes have been the outgrowth for the most part of needs which came upon the people suddenly and as a consequence of unexpected discoveries.

A feature of the common law to which the very highest importance was attached was, that the trial of causes, as well civil as criminal, should be by a jury of the vicinage, selected for their impartiality, and for their entire freedom from any prepossessions in regard to the case to be tried. To this tribunal was committed the decision upon the facts of the case, under the supervision of a judge, who decided questions of the admissibility of evidence, and applied the law to the facts found, and kept the jury secluded from outside influences. This method of trial was dear to the

people, and it has not merely been retained but has always been regarded as of such importance that in the constitutions of the several states provisions have been inserted to put it beyond the power of the legislature to abolish it. Cases of minor importance have been made exceptions, but the rule is general that the trial by jury shall remain.

Among the amendments to the constitution of the United States adopted after the great civil war is one providing that no state shall deprive any person of life, liberty or property, without due process of law; and due process of law includes trial by jury in the cases to which that method of trial belonged at the common law, and in which it has not by constitution or by statutory law been dispensed with. This was precautionary, and was intended to preclude the race, color and other prejudices growing out of the extraordinary state of things then existing, leading to unjust discriminations. The amendment is seldom appealed to, since state constitutions undertake to give full protection to the same rights, and state courts are seldom charged with failure to enforce them.

As the rules of the common law had their origin in rough and uncultured ages, they were not without features of wrong and hardship, but for the most part they were founded on principles of immutable justice, and the changes which have been made in them in America have been gradual and for the most part well considered. The changes have been more radical in the case of the domestic relations than in any other particular, and have consisted largely in taking from the husband the almost absolute control that, in respect to civil rights, he had at the common law over the wife. She did not in law act independently of him; she could not sue without his concurrence or without his being a party to the proceeding; she could not be a witness against him in civil suits; as a citizen she could not exercise political functions. Now, by legislation, she is permitted to sue independently, and she may even make the husband a party defendant in the enforcement of such demands as would constitute legal claims if owing to her from any other individual. For all the purposes of the enforcement of civil rights, it may be said as a general truth, that she may be recognized as entitled to proceed independently whenever her interest requires it. In these respects the legislation has imported into the common law for the accomplishment of justice rules that had previously pertained to another system of which some notice should here be taken.

From an early day it had been seen in England that, in their provisions for doing justice between man and man, the rules of the common law were in some respects seriously defective. They were especially wanting in provisions for the prevention of threatened wrongs, and for compelling the performance of agreements strictly according to their terms when nothing else would accomplish complete justice. Cases also of fraud, accident and mistake were not satisfactorily provided for by them, for the common law for the most part in civil cases undertook to do justice through an award of pecuniary damages. To meet the necessities of cases where such an award would constitute but an imperfect remedy, there grew up side by side with the jurisdiction of the courts which administered the common law another jurisdiction which undertook to administer equitable principles in such manner as to overcome common law defects and to supply deficiencies. These principles were understood to emanate from the conscience of the Lord Chancellor; and from the very nature of the case their administration was largely discretionary and the subject of much jealousy on the part of the common law courts, as well as of the people in general, whose participation was excluded. Nevertheless the chancery jurisdiction steadily extended and strengthened itself in the country of its origin, and its need was so great and so obvious that it soon became in the colonies a recognized part of their judicial systems, and as such remained and was from time to time extended by legislation after the colonies were formed into independent states. At first the chancery, or equitable jurisdiction as it was called, was administered by separate courts, but now the same tribunals administer both legal and equitable remedies, recognizing the right to trial by jury when the former are invoked, and awarding the latter according to established precedents, as would have been done had the jurisdiction remained separate. New rights owing their origin to legislation are to be protected by such remedies, legal or equitable, as shall be found suitable.

It is next necessary to an understanding of our subject, that we have in mind the peculiar organization of political institutions as they exist within the United States. To indicate the leading features of these, it is not necessary to go back to the formation and adoption of the constitution of the United States by the independent states which were previously united under articles of confederation, wherein they had expressly affirmed that they re-

tained severally their sovereignty and independence. Much of these they now surrender to a national government which, by the adoption of the constitution, they created, and which was vested with many of the very highest attributes of sovereignty, and made the exclusive representative of all the states in the family of nations. Of the powers conferred upon it an enumeration will not be entered upon here; it will suffice for present purposes to state that the national government was not only made supreme within its constitutional sphere of action, and given effective legislative and executive authority, but it had also created for it a judicial department, empowered to deal with all national questions judicial in their nature, and also with such controversies as in such a union were likely to threaten its peace or to constitute disturbing elements as between the states or any of their citizens. This department was made to consist of one supreme court, and of such inferior courts as congress should from time to time ordain and establish, and its power was to extend to all cases at law or in equity, arising under the constitution or laws of the United States and the treaties made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States should be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of a state claiming land under grants of different states; and between a state or the citizens thereof and foreign states, citizens or subjects. All judicial authority not thus conferred was left with the states, to be exercised without the power of national interference.

By an amendment to the constitution, the power which had existed at first to bring suits against states was taken from private persons, so that states can now only be sued in federal courts by foreign states and by other states of the union, though they themselves may bring suits against private persons as before. This, however, does not preclude the prosecution of suits in the federal courts for the wrongs of state agents or officers, when they overstep their just authority, and are guilty of acts which if done by a private person would constitute just ground for individual responsibility.

It is to be observed of the article of the constitution which defines the extent of the judicial power of the United States, that it is to be understood as not self executing, except in a few special

cases, of which the supreme court is expressly authorized by the constitution itself to take cognizance. For the most part, the national legislation must not only determine by law that courts additional to the supreme court shall be established but what within the limits provided by the constitution shall be the jurisdiction of the several courts, as well those which it creates, as of the supreme court itself. The constitutional grant is therefore to be understood as a grant that measures the extent to which congress, in its legislation, may go, in conferring judicial power upon national tribunals. It is not a grant which, by itself, excludes cognizance by state courts of controversies within its terms, but the legislation of congress in conferring jurisdiction upon national courts may, if deemed needful or politic, declare that jurisdiction exclusive. In general it has not been thought important that this be done. Each state has been left to the exercise of its judicial power as it existed before, and the purpose of the constitutional grant of judicial authority to congress is accomplished by legislation for the transfer from state to national courts of the cases originating in the former, when questions arising under the constitution are presented for adjudication, so that the final decision may be made by the federal tribunal. The provisions which have been enacted upon this subject are for the transfer before trial, when one of the parties to the suit is a citizen of another state or a citizen or a subject of a foreign state; and for the transfer after trial for the purpose of a review under the law, whenever a claim is made under the constitution of the United States or of a law of congress, and the decision is against the claim in the state courts. With this power of transfer, the protection of individual rights under the constitution and laws of the United States is made as complete as in the nature of things seems possible. Where the decision in the state courts admits the claim which is made under national law, the occasion for review in national courts does not arise and is not provided for.

In considering the administration of justice in the United States, therefore, we are to look first of all to judicial proceedings in the several states of the union,—the jurisdiction of their courts being far more extensive and general than is that of the federal courts, and a larger proportion of all controversies between man and man being there considered and finally passed upon. The jurisdiction of the federal courts is to be understood as exceptional, and as conferred only for the purposes of the har-

monious working of the government created by the constitution, and in order that there may be tribunals for the peaceful adjudication of all controversies that may arise between citizens of different states, and between foreign states, their citizens or subjects, and the states of the union or their citizens.

In the administration of civil justice the national courts follow the practice of the courts in the states in which they sit, and practitioners in the highest state courts are received as practitioners in the national courts also, so that the existence of the two jurisdictions leads to no confusion. The same persons practice in all the courts, and under rules of procedure that differ in no important particulars. The constitution of the national and state courts, however, is likely to differ in one particular of high importance. In the early history of the states the judges of all but the local courts of limited jurisdiction were selected by the executive, with the approval of the legislature or of the upper house thereof, and were to hold during good behavior; and this method of choice was adopted for the national judiciary. But for many years the tendency in the states has been towards an election of judges of every grade by popular vote, for a definite term of years; and this is now almost the universal rule. The evils that by many conservative persons were expected to flow from this change have not been realized; the judges thus chosen have as a rule discharged their duties fearlessly and impartially, and have won public confidence and support by so doing. The national judges are still selected as at first; and while it must in fairness be said that the elective judiciary has not proved unduly subservient to pervading popular opinions and passions, so also it must be declared that the appointed judges have not improperly deferred to executive or legislative views or wishes. Private interests it is generally believed have been equally secure, whether committed for protection to judges of presidential selection, or to those of corresponding rank and presumed attainment elevated to their positions by popular choice.

In passing upon questions of purely state law, or of the construction of state constitutions, the national courts are expected to receive and follow the decisions of the highest courts of the states as their proper and conclusive guides, just as the state courts on the other hand are required to follow the decisions of national courts when the question involved concerns the national authority.

The pleadings of parties to a civil controversy whereby an issue for trial was formed, became, under the common law practice in America, exceedingly verbose and technical, and by legal ingenuity were sometimes made a trap for suitors, involving them in needless expense, and perhaps even depriving them of substantial rights. Codes of procedure have been enacted in a majority of the states of the American Union, which are intended to do away with all needless technicalities, to make pleadings as direct and simple as possible, and to expedite and simplify throughout all the legal proceedings. Where such codes have not been enacted the pleadings have been reformed by statute or rule of court, so that the general rule in American courts now is, that a plain and simple statement of a suitor's case or defense, such as would suffice to make it understood by an unprofessional person of ordinary intelligence is a sufficient pleading to answer the requirements of legal practice. This is equally true whether the particular remedy in view is legal or equitable;—the most plain and simple statement of the facts and of the redress sought, or the defence relied upon, brings the case in the most satisfactory manner before the court. Contemporaneously with this reform in procedure has come one of the very highest importance regarding the admissibility of evidence. The slightest interest of a person in the result of a litigation was at the common law a reason for refusing to receive his testimony, as was also the fact that he was party to the suit though not liable to be directly affected by the judgment. This is now completely changed, and any one thus at the common law excluded, if he has knowledge of important facts bearing upon a legal issue, may deliver them in court as freely as any other witness, his interest or connection with the suit going to his credibility only. The rule of law now is that all merely technical objections to the admission of evidence shall be put aside, that all testimony properly bearing upon the issue shall be received, leaving its trustworthiness to be determined by the jury, or by the court when no jury is assisting.

While it is hoped and expected that under the constitutional systems, state as well as national, the aim of the courts will always be to do justice according to the best of their ability, it is also intended that they shall be independent in the discharge of their duties, and that neither the legislative nor the executive department of the government shall be at liberty to interfere, or to take upon itself the performance of any function judicial in its

nature, except in cases of which the preservation of order in legislative bodies is an illustrative instance, where what is to be done is merely in aid of the legislative or executive function, and not, for that reason, to be considered as properly judicial. The legislature has no power to give judgment in judicial controversies, or to over-rule or modify such as the courts may render, or in any manner to intermeddle therewith, or with the courts for rendering them. The executive is equally powerless. The remedy for the misbehavior of judges is removal from office, or such other punishment as the constitution or the statutory law may provide, but the judgments must stand as rendered, unless set aside or modified by the judiciary itself in regular proceedings. Should either of the other departments of government overstep the bounds of its authority and usurp judicial functions, the judiciary would treat its action as void, and formally annul it if needful; and if a citizen were improperly deprived of his liberty by legislative or executive order, the proper court, on his being brought before it on *habeas corpus*, would order his discharge, and might also award damages for the wrong he had suffered against those concerned in committing it.

It is not uncommon in the United States to speak of the judiciary as the special guardian of the constitution, obligated to see that its provisions are observed, and to keep the other departments within the limits of their constitutional jurisdiction. The statement is wanting in accuracy and is likely to be misleading. Every officer in the three departments of government is equally under obligation to observe with fidelity all constitutional requirements, and there is a failure in official duty when a legislative or executive officer disregards this obligation, on an assumption that the duty to construe and to protect and enforce the constitution in all its provisions rests in no degree upon him, but pertains in an especial manner to the judiciary. The duty to see that it is obeyed in every particular must be understood to rest equally upon each of the departments and upon all of their officers; but as the final decision, when constitutional questions arise in legal proceedings, must rest with the judiciary, the judicial determination must be equally binding upon all officers and all citizens, and for that reason will become the conclusive rule of action thereafter. Only in a few cases, in which legislative or executive action is in its nature discretionary, can the judicial interpretation of the constitution be disregarded, and then only because judicial inter-

ference, unless invited by the department entitled to act, would be impertinent and intrusive.

In cases of public importance in which by law duties are imposed upon administrative officers or boards, or upon corporate authorities, and there is a failure to perform them, whether from intentional neglect, from ignorance or from misconception or misconstruction of powers, the prerogative writ of *mandamus*, whereby prompt obedience to the law in its true meaning is commanded and enforced, has long been a favorite remedy, because the more summary than any other, and more likely to be effective in enforcing obedience to important legal provisions. The same writ may be equally effective and equally proper in very many cases in which the duties to be performed concern private interests chiefly, or perhaps exclusively, but where no other remedy, either legal or equitable, would fully meet the requirements of the case and accomplish complete justice. It is therefore becoming a common remedial writ, though more especially in state than in federal courts, and is particularly favored in those cases in which constitutional questions are raised or doubts pretended by administrative officers to excuse official delinquencies or refusals to obey statutory law. The proceeding is summary, and is expected to be carried to a speedy conclusion without the delays which are not unusual in formal suits, and it is only when the facts are in controversy, and issues are made which call for the taking of evidence as upon trials in other law cases, that this expectation is likely to be disappointed. What would otherwise be long and expensive controversies when the constitutional validity of statutory law is in question are in very many cases, by a resort to this remedy, in a simple but perfectly natural and satisfactory way, prevented, and public doubts as to rights and obligations under new conditions are, as they ought to be, speedily and authoritatively solved. It is a remedy that is steadily growing in favor and in usefulness, for in many cases it anticipates and prevents official wrongs which if committed would be inadequately redressed, if redressed at all, in an ordinary suit at law.

If one were to undertake to point out in specific and concise terms the chief features of the administration of civil justice in the United States of America, he might perhaps sufficiently do so were he to say:

That they are to be seen in the protection of rights established and defined by laws, all having presumptive origin among the

people, or enacted by representatives freely chosen by the people;

That the tribunals which give protection are composed of judges chosen directly or indirectly by the popular voice and in methods which meet with general approval;

That these tribunals whenever their jurisdiction is invoked, are expected to apply, without unnecessary formality in procedure, the remedy which experience, with its teachings embodied in statutory law or in judicial precedents, has indicated as suitable and sufficient for the accomplishment of justice in the particular case;

That the official sittings are to be open to the public, and must allow a full hearing all the parties concerned, with such assistance of counsel as they may desire, and a full presentation of all pertinent and material facts from whatever source they may come;

That no one by reason of official position, or of any privilege not derived from international law, can claim exemption from the jurisdiction of the courts in respect to the demands made against him, and the judgments, duly rendered, are the supreme law, and those in whose behalf they are rendered may confidently and securely rely upon them as such;

That though the courts of first instance are not in most cases, the higher courts, their judgments, when error is alleged, are subject to review in the highest courts in all cases of importance, and by means thereof uniformity of decision upon the law and in its administration is preserved; And

That though the courts, in the ordinary and regular exercise of their proper powers, may, whenever legislative or executive action is in question and is found to be for any cause invalid, proceed to declare the invalidity and to protect such rights as would be injuriously affected by it,—thus precluding the possibility of arbitrary exercise of authority by the other departments of the government,—yet in whatever they may do the courts themselves are at all times under the rules of the constitution, which holds them strictly to the exercise of judicial authority, and under checks carefully devised and declared or indicated by the fundamental law, to prevent abuse of judicial powers, or the usurpation of those not judicial.

Having now given a very summary view of the administration of civil justice in the United States, the questions may perhaps be asked whether in the opinion of the writer the prevailing

methods are wholly satisfactory; whether they are expected to continue indefinitely without any considerable change, and what particular change, if any, is looked forward to as likely to be soon brought about, from which valuable results may be anticipated. To such questions reply may be made that the writer is not to be understood as claiming that existing methods are without serious defects, or that they can always be relied upon to work out correct results as completely as ought to be possible, but he believes that changes in the future as has been the case in the past will be made slowly instead of by radical revision or the adoption of untried ways. The most important change likely to be brought about speedily seems to him to be such a modification of the jury system of trial as will dispense with unanimity in rendering a verdict, and admit of the reception of the conclusion reached by some specified majority of the panel as the legal finding. There is already considerable legislation in this direction.

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NOTES.

JUDGE COOLEY HONORED.—One of the most profitable meetings of the American Bar Association convened at Milwaukee, August 30. More than two hundred members are reported to have been present. The program was of more than usual interest. Among the more interesting features were the annual address by President Randolph Tucker, of Virginia, the address of Mr. Justice Brown, of the United States supreme court, on "The Distribution of Property," and the address of U. N. Rose, of Arkansas, on "Law of Trusts and Strikes." But the closing hours of the association's meeting witnessed its most praiseworthy act. In electing Thomas M. Cooley to the presidency of the association, the members honored one of the ablest of jurists, and honored themselves. Throughout the legal fraternity it will be universally admitted that none is more deserving of this distinction, and mark of appreciation from the bar of America, than Judge Cooley. It is well that occasionally merited tributes are not withheld until after the death of the deserving recipient. To the rising generation of lawyers Judge Cooley's life is an inspiration. To the young man starting in life from an humble position it points to the possibilities before him. His father was a man of humble circumstances in Attica, N. Y., where he was born Jan. 6, 1824. By hard manual labor and economy he acquired his early education. In 1843, at the age of nineteen years, he began the study of law at Palmyra, N. Y., but the same year removed to Michigan and located at Adrian. He continued his law studies, a portion of the time holding the office

of deputy county clerk, until 1846, when, at the age of twenty-two, he was admitted to the bar. Four years later he was elected circuit court commissioner. In 1852 he left the law temporarily to engage in the real estate business in Toledo, Ohio, but soon returned to the active practice of his chosen profession, at Adrian. He became junior member of the firm of Beaman, Beecher & Cooley, and later, senior member of the firm of Cooley & Crosswell,—the latter afterwards becoming governor. In 1857 began the career that was to steadily advance him to his present high position in the profession. That year he was appointed to compile the general statutes of Michigan; one year later he was made supreme court reporter; and the year following was appointed one of the professors of the University of Michigan Law School. He then removed to Ann Arbor, where he has since resided. His house, a stately stone structure, but after all, rather modest and unpretentious in appearance, is one of the first objects of interest which visitors to that "Modern Athens" ask to have pointed out to them.

The score or more of years following Judge Cooley's elevation to the supreme court of Michigan, in 1864, were years fraught with arduous and incessant labor, and resplendant with magnificent achievements. As a member of the supreme court, he gained the highest esteem of his associates, and the admiration of the bar who practiced before that tribunal. His decisions were always the result of profound study and careful investigation. They have aided in giving the Michigan reports a reputation for high standard of excellence throughout the country. As a professor, the zeal with which he entered upon his work, and the clearness of his expositions of the fundamental principles of the law, have imbued the thousands of students who have sat under his instruction with a determination to pursue their legal studies upon a higher plane. It is as a law writer, however, that he has gained his greatest eminence. His first great work, "Constitutional Limitations," appeared in 1868. Four years later came his edition of "Blackstone's Commentaries;" followed in succession by his edition of "Story's Commentaries on the Constitution," in 1874; "Taxation," in 1877; "Torts," in 1879, and "Constitutional Law," in 1880. We stand almost appalled when we try to comprehend the vast amount of work these several volumes represent. Every one of them is universally recognized as the highest standard of authority upon the subject treated. While his lectures have borne fruit far from the halls within which they were delivered, and his decisions cited as the best authority throughout his native land, yet it is his law treatises that have carried his name across the seas, and made his reputation world-wide. The degree of Doctor of Laws has been conferred upon him by both the University of Michigan and Harvard, by the former in 1873, and by the latter in 1886. His appointment as chairman of the Interstate

Commerce Commission, upon the creation of that body, was universally commended as a deserved honor. His name has been more than once quite generally mentioned as one worthy of appointment to the United States Supreme Court, and with the return of health it is possible that the hope of an admiring public may yet be realized.

THE BICYCLE'S LEGAL RIGHTS.—The bicycle promises to furnish its quota of litigation. Just now its friends are kept engaged in defending it on the charge of its being a nuisance. They scored one victory in a case before an inferior court of Grand Rapids recently. A gentleman of that city believed the bicycle to be a nuisance, and took a rather unique way to abate it. A lady started to ride past his house on his walk when he turned a stream of water from his lawn hose across her path, causing her to abruptly dismount to avoid a drenching. He was arrested for disturbing the peace, under the city ordinance, and fined seven dollars and a half. The case has been appealed, and the supreme court will probably be called upon to decide whether the bicycle is really a nuisance, and if so, how far one can determine for himself how it shall be abated. It received far less favorable consideration at the hands of an English lower court in a recent case, the following note of which is given in the *Law Gazette* (London):¹ "It is rather annoying that a lawyer who elects to spend his vacation on the back of a bicycle, should be worried with summonses, but then he above all others should be familiar with and observe acts of parliament. At the Colwyn Bay police court, Mr. F. Kinsey, solicitor, Crewe, was summoned by the Rev. Venables Williams, J.P., vicar, for riding a bicycle without sounding a bell. The rev. gentleman said that about 11 a.m., on 16th July, he was driving to Colwyn Bay when defendant passed on his bicycle from behind without giving any intimation of his approach. He called out 'Why don't you ring your bell?' but received no answer; he called a second time, and defendant turned round and said 'No necessity.' In reply to the bench, defendant said he rang his bell twice before he reached the carriage, and when he replied 'No necessity,' he understood the vicar to simply mean that he should have rung it on passing the carriage, for which action, of course, there was no necessity. Defendant addressing the vicar, 'Did you not consider my answer somewhat rude?' 'Yes, I did.' 'And I suppose that is practically why the summons is issued?' 'Oh, dear no; the summons is issued because bicycles are now creating a great nuisance, and as at the last court I called the attention of the police to the matter, I determined to summon you as an example.' The defendant said that he had been put to a great expense in coming from Crewe, and he

¹ Vol. 1, p. 124. (August 19.)

expressed a hope that the bench would dismiss the summons. Defendant was fined 14s. 6d., including costs."

The result of the latter case will probably not be read with a great deal of pleasure by Mr. Albert A. Pope, of Boston, who is just now trying in vain to make our skeptical contemporary, the *American Law Review*, believe that his recent agitation (or attempted agitation) of the "good roads" question, was in the interest of the rural inhabitants, instead of the Pope Manufacturing Co. But then, the editor or the latter publication is too portly to ride a bicycle, anyway, which may account for his lack of sympathy for Mr. Pope's pet scheme. He does not even fall in with the latter's remarkable idea that bicycles ought not to be taxed as other personal property.

THE "JAG-CURE" LAW.—The *American Law Review*,² in a note headed "Crank Legislation," gives some interesting and amusing freaks of legislators of different states. Many persons of this state will no doubt wonder why the act of the last Michigan legislature, familiarly known as the "Jag-Cure Law," was not included in the list. The promoters of the law, no one doubts, were sincere in their belief that the law would work the beneficial results they anticipated, but it is extremely doubtful if even its most earnest supporters are as sanguine of its success, when they see it upon the statute books and contemplate it in practical operation. The act, among other things, provides: "Whenever any person shall be charged or complained against as being a disorderly person on account of drunkenness or intoxication in the courts or before any justice of the peace or police justice of this state, it shall be lawful for such court or justice of the peace or police justice to accept from such person a special recognizance in the penal sum of \$100 with a good and sufficient surety to be approved by such court or justice of the peace or police justice, conditioned that such person will immediately take treatment for the cure of such drunkenness or intoxication of some established cure to be therein specified for the period of at least thirty days, and that such person will observe and obey all directions and regulations prescribed by those administering such cure; and that such person will not indulge in the use of intoxicating or malt liquors for the period of ninety days, and that such person will at the end of sixty days from the date of such recognizance, appear before such court, justice of the peace or police justice, and answer the charge or complaint against such person."

Police judges find it extremely impracticable, if not utterly impossible, in some instances, to comply with the law. Under the law the offender must be sent to an institution under contract of such corporation. Few cities have incorporated establishments,

² Vol. 27, p. 587. (July-August.)

and private gold-cure physicians are loath to go to the trouble and expense of forming stock companies when the amount of business to be received is so uncertain. The law further provides that in cases where the accused is shown to be indigent, the cost of treatment may be a charge against the county, when it does not exceed the sum of seventy dollars. Inasmuch as the county has a department to care for persons in destitute circumstances, and hired physicians to look after its indigent sick, it is thought that the board of supervisors cannot be compelled to pay additional bills contracted in this unusual way. The law is thought to be unconstitutional for other reasons, and nearly every one who is likely to have anything to do with it seems anxious to have the supreme court get a chance to nullify the obnoxious piece of legislation.

RELATIONSHIP BETWEEN HUSBAND AND WIFE.—Is a wife one of her husband's relations? It is not often material whether she can be technically termed such or not; but this state has a statute which the supreme court will sooner or later be called upon to construe, and in doing so this question will be one of the first to decide. One section of the chapter upon wills provides:³ "When a devise or legacy shall be made to any child or other relation of the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will, in the same manner as the devisee or legatee would have done, if he had survived the testator, etc." The question was very recently submitted to the probate judge of Kent county,⁴ and until ruled upon by a higher court the decision of that tribunal is entitled to considerable weight. By the will of Seth Holcomb the sum of four thousand dollars was bequeathed to Lucy Ann Holcomb, his wife, as a specific legacy. Lucy Ann Holcomb died before the testator, but the will was left unchanged. John W. Holcomb was the sole heir of both parties. The residuary clause of the will gave the balance of the estate to two minor children of John W. Holcomb. The latter filed his petition in probate court alleging that he had looked after his father's estate for several years prior to his death, without compensation, the understanding between them being that the legacy left to the wife went to John as her sole heir-at-law upon her decease, instead of falling into the residuary estate, and that he would be thus compensated for his services. The court was asked to so construe the statute above quoted. The court took another view, however, and after reciting the facts above stated, concluded: "The only question is, whether a wife can be considered to be a relative of her husband, it being considered that otherwise the legacy in question would lapse and fall into the residuary estate. The court is of the opinion that the term relative applies only to relations by consanguinity, and that

³ How. Stat., § 5812.

⁴ *In re Estate of Seth Holcomb.*

therefore the wife is excluded. . . . The petition is therefore dismissed." This precise question has not, to our knowledge, been before the supreme court, and is therefore a novel one in this state. Although at first thought the correctness of the holding may be questioned; yet the meager decisions and authorities upon the subject sustain the opinion of the probate judge.⁵

NON-PARTISAN JUDGES.—At the next judicial election in Chicago the attempt to elect a non-partisan ticket, nominated by the bar of the city, is to be repeated. It was tried at the last election and though satisfactory in many respects, the results were not what the more sanguine advocates of the scheme desired. There are to be three circuit and five superior court judges elected in that city. Four republicans and four democrats have been named at the bar primaries to form a ticket which the bar are expected to support regardless of politics. The ballot was sent through the mail or deposited personally at the designated place. About fourteen hundred ballots were cast at the first bar primary, at least four hundred more than were cast upon any previous trial of the plan. The voter was compelled to select four from the republican list of candidates and four from the democrat list; for where that rule was not observed the ballot was rejected. A majority of all votes cast was required to nominate. Four of the democrat candidates received a majority at the first primary, and the democrat nominations therefore complete. Only one of the republican candidates, however, received the necessary majority; Judge Joseph E. Gary, of anarchist trial fame, who received eleven hundred and seventy-two votes, next to the largest vote received by any candidate. George Mills Rogers, the leader of the democrat candidates, received the highest vote, twelve hundred and twenty-two. As no republican besides Judge Gary received a majority over all, a second bar primary was required to nominate the other three republican candidates. Nearly twelve hundred votes were cast at the second primary. The ticket complete is as follows: Republicans—Joseph E. Gary, Edmund W. Burke, John Gibbons and Henry W. Freeman. Democrats—George M. Rogers, John W. Snowalter, Adam A. Goodrich and Samuel A. Lynde.

A CERTAIN New York physician sent a bill to one of his patients for \$670 for professional services. The services were not disputed but the amount charged therefor objected to by the patient, who sent his check for \$400, stating that it was to be in full satisfaction of the claim. The check was accepted, but another bill sent for same amount with the amount of the

⁵ See *Estey v. Clark*, 101 Mass., 36, 38; 2 Woer. Amer. Law of Adm., 939; 2 Williams on Executors, 1118; Sch. on Wills, §537.

check credited thereon as part payment. The patient at once notified the doctor that the check was sent upon condition that it should be received in full payment of the bill, and that it must be either kept upon that condition or immediately returned. This notice was disregarded and suit brought for the balance. The New York court of appeals, in a well-written opinion, in which the law of accord and satisfaction is quite thoroughly discussed, held that the debt, which was unliquidated, was satisfied by the retention of the check, since its acceptance involved the acceptance of the condition also.⁶

HAS an administrator or executor a right to continue the business of a saloonist, under his license, after his decease, without again paying the tax required by law? ⁷ This was the sole question before the supreme court in *People v. Sykes*.⁸ The court very logically held that, as the bond of deceased would be no protection whatever against unlawful sales made by the administrator, and a bond being required to be executed, approved and filed with the county treasurer before a tax can be paid and a receipt given, the administrator cannot carry on the business without first paying the tax and giving a new bond. The right to carry on the business being in the nature of a license to the party who complies with the statute, it does not pass over to the administrator at the death of the party holding it.

THERE is a Chinaman named Ah Wing, in Montana who does not raise the slightest objection to the Geary law. In fact he is extremely anxious that it shall be enforced to the letter. He is undergoing a life sentence in the state prison, and of course has not registered as required by the law. His celestial brain has conceived the ingenious idea that he should be prosecuted for violating the provisions of the law as to registry, and deported to China, as the United States statute is paramount to the state law under which he was confined. He has accordingly hired a lawyer to prosecute him, and secure his deportation.

THE recent congress of women lawyers developed the interesting and somewhat surprising fact that there are one hundred and ten of the fair sex who have been admitted to the bar in this country. Of these eight are qualified to practice before the supreme court of the United States.

OVER-HANGING branches of trees constitute a nuisance which the owner of the land over which they extend may abate by cut-

⁶ *Fuller v. Kemp* (May 2), Maynard, J. 16 N. Y. Supp., 158, reversed.

⁷ Act No. 313, Pub. Acts 1887.

⁸ July 25. Long, J.

ting them off even with his line. This he may do without notice to the owner of the trees. He is not estopped from doing so by the fact that he has offered compensation therefor. Such an offer is considered merely as a gratuitous one which, being refused, does not bind him to give further notice. These were the interesting points in the decision of the supreme court in *Hickey v. Michigan Central Railroad Co.*⁹

THE New Jersey supreme court gave a very clear and reasonable construction of the law as to sales on approval in a recent case,¹⁰ in which it was held, that when goods are manufactured or sold and delivered subject to approval of the purchaser, it is incumbent on him unless he approves, to express his disapproval within a reasonable time, or within the time limited by the contract; and that the absence of such expression is sufficient evidence of approval, or at least of a waiver of the right to insist upon approval as a condition precedent to a recovery by the seller.

A DEBTOR of an insolvent bank, according to a recent decision of the supreme court,¹¹ in an action by the receiver to recover money due the bank at the date of its suspension, cannot set off a certificate of deposit procured from a creditor of the bank after its suspension and before application for appointment of receiver was made.

⁹ July 25. Montgomery, J.

¹⁰ *Columbia Rolling Mill Co. v. Beckett Foundry & Machine Co.* (June). 21 Wash. Law Rep., 508.

¹¹ *Stone, Receiver, v. Dodge*, July 26. McGrath, J.

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MURDER—Jury can determine whether or not there was malice, thus reducing the offence to manslaughter. *People v. Palmer.* Montgomery, J. Reversed.

FIXTURES—Mortgage—What machinery is included as a part of the realty. *Smith v. Blake.* Hooker, C. J. Affirmed.

CONTRACT—Admissibility of evidence of defendant's absence when contract was made. *Curren v. Ampersee.* Hooker, C. J. Reversed.

DAMAGES—Defective sidewalk—Evidence as to length of time it was in bad condition admissible. *Alberts v. Vernon.* Hooker, C. J. Affirmed.

NEGLIGENCE—Presumption—Failure to keep machinery in order. *Redmond v. Delta Lumber Co.* Hooker, C. J. Affirmed.

BOOK REVIEWS.

THE LAW OF INCORPORATED COMPANIES OPERATING UNDER MUNICIPAL FRANCHISES.—By Allen R. Foote and Charles E. Everett. Cincinnati: Robert Clarke and Company.

This work is another one of the many indications of the present trend of industrial activity. The chief phenomenon of the present stage in the evolution of business is the growth and rapid development of corporate life. This is almost a trite observation, but it will, nevertheless, probably be made by every editor who takes up Mr. Foote's book for review. It is not business which follows law, but it is the law which conforms itself to the changes in the methods of conducting business. So, when the corporation came into being, corporation law was born with it, and as this new industrial entity grew the law of corporations developed with it. A new treatise on partnership is rarely issued now-a-days. The identity of the individual is swallowed up, and new works on the varied branches of corporation law are coming from the publisher's press in rapid succession.

This work, prepared on lines laid down by Mr. Foote, and preceded by an interesting philosophical treatise, from his pen, on the economic principles involved, and very ably edited by Mr. Charles E. Everett, of the Cincinnati bar, represents also the careful work of a number of lawyers throughout the country. It is a logical and well arranged statement of the law in each state relating to corporations operating under municipal franchises, such as water companies, electric light and power and street railway companies, telephone companies, and fuel and illuminating gas companies. A general treatise upon the law of corporations of this character is a practical impossibility. Our state legislatures were left to deal with it without the guide of the common law. The law is purely statutory, and each state has passed its own law. Mr. Everett, in a preliminary chapter, has very clearly summarized the law respecting this class of corporations, in a discussion of the general principles, with which he undoubtedly became thoroughly familiar in the careful examination of the laws of each state, which is evidenced by his work as editor. The laws of each state varies in many respects, of necessity, and hence the production of this work in its form as a collection of the statutory laws of each state, uniformly arranged.

We take pleasure in commending the editor's choice of a lawyer to compile the Michigan law. Mr. Henry A. Chaney is one of the few Michigan lawyers qualified to do this work. He has established quite a reputation as a legal author, although he is not, like Judge Cooley and Mr. Meeham, known as an author of standard text books. His contributions to legal literature have usually been articles of a light character, something with which the literature of the law should more frequently be leavened. At the end of the second volume of the work is a biography of the author of the compilation of the statutory law of each state. The following is Mr. Chaney's biography:

"Henry A. Chaney, the author of the Michigan section, was born at Burlington, Vermont, July 5, 1848. He was educated in the public schools

at Ogdensburg, New York, and in the Detroit High School. He was graduated from the academic department of the University of Michigan in 1868, and from the law department in 1871. He was assistant of the Michigan senate in 1872, legislative correspondent of the *Detroit Tribune* in 1873, clerk to the commissioner of railroads for Michigan in 1873-4, state reporter in 1878-1886 (reporting volumes 37-58 of the Michigan reports). In 1876 he published a digest of the Michigan reports, and, in 1877, a manual for notaries. He is professor of medical jurisprudence in the Michigan College of Medicine and Surgery, and of the law of contracts and crimes in the Detroit College of Law. He is actively engaged in the practice of law in Detroit at the present time."

PATENT INFRINGEMENTS.—By THOS. B. HALL, of the Cleveland bar. Cincinnati: Robert Clarke and Company.

This volume, just issued from the press of this well-known publishing company, is a digest of the decisions of the supreme court of the United States, bearing upon the subject of patent infringement. It is subdivided under four "heads," viz: 1. License under Patent. 2. Identity of Invention. 3. Validity of the Patent. 4. Recovery for Infringement. The first subject is subdivided under two heads; the second under six heads; the third under twenty-four, and the fourth under two. The work is sectionized consecutively into 673 sections, each section presenting the substance of a distinct decision of the supreme court. A citation of one or more decisions is given for every section, together with the year of the decision, so that it may be seen at a glance whether the decision is a late one, or of long standing. The whole body of the law of the infringement of patents, as laid down by the court of last resort is here given. The arrangement is scientific and methodical; the statement of the law brief and condensed; the typographical execution excellent. On the whole it is difficult to see how any attorney who expects to engage in patent law can afford to be without this work. The text is not accompanied by any personal discussion of the law as laid down. It is the court that speaks, and not the compiler. The author, or rather the compiler, very appropriately quotes, as an introduction to his work, the language of the supreme court, as follows:

"A question arising in regard to the construction of a statute of the United States concerning patents for inventions cannot be regarded as judicially settled, when it has not been so settled by the highest judicial authority which can pass upon the question."

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ALFRED RUSSELL'S OBJECTIONS TO A CODE OF CIVIL PROCEDURE.

SAMUEL MAXWELL.

In the July number of the MICHIGAN LAW JOURNAL Mr. Alfred Russell states his objections to a code in a clear, direct and entertaining manner, and although the reader may not be convinced by his argument he cannot fail to be pleased with his style. It is the strongest argument against the adoption of the code that has yet been presented, and Mr. Russell is to be congratulated on that fact.

It may be well, however, to examine the reasons assigned by him in detail and see if they support his objections.

1st. The constitutional objection that "no law shall embrace more than one object which shall be expressed in its title." In *People v. Mahany*¹ the supreme court of Michigan say: "There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its design when required to pass upon it." The constitutions of Kansas, Kentucky, Maryland, Minnesota and Nebraska declare that no law shall contain more than one subject which shall be expressed in its title." Judge Cooley says that in the Louisiana, Michigan and New Jersey constitutions the word *object* is substituted for *subject*.² It is evident that there is

¹ 15 Mich., 481: Cooley's Const. Lim. (6 ed.) 173.

² Cooley's Const. Lim., 169, n. 3.

but little difference in the meaning of the words in the connection in which they are used³ The question here presented has been decided a number of times by the supreme court of Michigan. Thus in *Toledo etc. R. R. Co. v. Dunlap*⁴ it was held that "an act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroads in this state" is not invalid by reason of a defective title. It is said, "It does not appear to us that this title covers more than one object. It is to bring together the legislation concerning the creation and management of railroads." In *People v. Pond*⁵ the same court considered "an act to revise an act to incorporate the city of Bay City. Approved March 30, 1881, as amended and revised by the several acts amendatory and revisionary thereof and to add twenty-three new sections thereto." This act provided for the establishment of a police court with original and exclusive jurisdiction in criminal cases, and it was held that it was not in conflict with the constitution.

The same court in a recent case held the following title to contain but one object: "An act to prohibit the manufacture, sale, keeping for sale, giving away or furnishing of vinous, malt, brewed, fermented, spirituous, or intoxicating liquors, or any mixed liquors, or beverage, any part of which is intoxicating, and to prohibit the keeping of any saloon or other place for the manufacture, sale, storage for sale, giving away, or furnishing of such liquors or beverages and to suspend the general laws of the state relative to the taxation and regulation of the manufacture and sale of such liquors in the several counties in this state under certain circumstances; to authorize the qualified electors in the several counties in this state to express their will in regard to such prohibition by an election; and to authorize and empower the board of supervisors of the several counties, after such election, if they shall determine the result to be in favor of such prohibition, to prohibit the manufacture, sale, keeping for sale, giving away, or furnishing of any such liquors, or of the keeping of a saloon or other place for the manufacture, sale, storing for sale, giving away, or furnishing of the same within their respective counties; and to provide for penalties and rights of action in case

³ Id.

⁴ 47 Mich., 456; 11 N. W. R., 271.

⁵ 34 N. W. R., 647.

of its violation."⁶ Many other Michigan cases could be cited but it seems to be unnecessary. In *Johnson v. Harrison*⁷ the supreme court of Minnesota held that "an act to establish a probate code of procedure, contained but one subject although it included certain provisions relating to the descent of property. The act was subdivided into 21 chapters which contained 326 sections. It was intended to cover all matters of which probate courts have jurisdiction. It is said, "While this provision is mandatory, yet it is to be given a liberal, and not a strict, construction. It is not intended, nor should be so construed as to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, or by multiplying their number, or by preventing the legislature from embracing in one act all matters properly connected with one general subject. The term "subject" as used in the constitution, is to be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other." . . . All that is necessary is that the act should embrace some one general subject; and by this is meant merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject. The large number of related or cognate matters often treated of under some comprehensive title, such as "Criminal Code," "Penal Code," "Code of Civil Procedure," "Private Corporations," "Railroad Corporations," and the like are familiar illustrations of what may be legitimately included in one act. Any construction of this provision of the constitution that would interfere with the very commendable policy of incorporating the entire body of statutory law upon one general subject in a single act, instead of dividing it into a number of separate acts, would not only be contrary to its spirit, but also seriously embarrassing to honest legislation. All that is required is that the act should not include legislation so incongruous that it could not, by any fair intendment, be considered germane to one general subject."⁸ In 1873 the legislature of

⁶ 47 N. W. R., 38.

⁷ 50 N. W. R., 923.

⁸ *Johnson v. Harrison*, N. W. R., 924.

Nebraska passed "an act to establish a criminal code." This defines the several offenses and the procedure throughout from the examination of persons accused of crime to the review of the proceedings in the supreme court. In *Boggs v. Washington County*⁹ objection was made that the title was not broad enough to charge a party with costs, but the objection was overruled. It is said, "The provisions of the criminal code herein referred to embrace not only the subject of the audit and allowance of such fees, but also the source and manner of payment. As to the constitutionality of these provisions there can be no serious doubt." Many other cases to the same effect may be found. In fact there is no well considered case holding the contrary. The first objection therefore is clearly untenable.

2nd. That Article 6, Sec. 5, of the constitution "requires the supreme court to establish legal practice." The most that can be claimed for this provision is that it requires the supreme court from time to time to adopt rules of practice so that they may be uniform over the state. If more than this is claimed it can readily be shown that notwithstanding the provisions above quoted the legislature may change or simplify the practice.

3rd. But it is said that "Art. 18, Sec. 15, ordains that no general revision of the laws shall ever be made." As the constitutional convention was held in 1849, and a general revision of the laws had been made by Judge Green but a few years before, it is but reasonable to suppose that the convention considered the revision so perfect that no other would be necessary, hence, therefore, there should be no revision. But no one familiar with the subject will contend that a code procedure is a revision in any sense. Neither is it necessary to appoint one or more commissioners to prepare it. The code is no longer an experiment. It has existed in New York for 45 years, and in California and Ohio for 40 years, and in Indiana and Wisconsin nearly as long. Every state west of the Mississippi with the possible exception of Texas possesses a code. Almost any of these would be found acceptable to the people and bar of Michigan. The legislature of this then territory (Nebraska) in 1858 adopted the Ohio code and in 1873 the criminal code of that state was adopted without the intervention of commissioners in either case.

4th. It is said that in 1873 the legislature by joint resolution

⁹ 18 Neb., 298.

required the governor to appoint two commissioners to prepare a code of procedure similar to that of New York, and that the attorney general rendered a written opinion that the measure was unconstitutional, and the governor refused to act. The ordinary course pursued when an act is passed by the legislature requiring the governor to perform certain duties is that he quietly complies with the request. It is for the court to interpret the constitution and declare an act in conflict with it. Had the question been fairly presented to the supreme court of Michigan, composed as it then was of four of the ablest judges in the nation, the writer has no doubt the judgment would have maintained the holdings.

5th. The Connecticut code is taken as an example and it is said that it "divides claims into seven classes." These divisions however refer alone to the causes of action which may be joined, and not to the division of causes of action. Thus, take the original section of the Ohio code on that subject: "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in either of the following classes:

1. The same transaction or transactions connected with the same subject of action.

2. Contracts, express or implied.

3. Injuries, with or without force to person and property, or either.

4. Injuries to character.

5. Claims to recover possession of personal property with or without damages for the withholding thereof.

6. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

7. Claims against a trustee by virtue of a contract or by operation of law.

The causes so united must belong to one of these classes; must affect all the parties to the action, and not require different places of trial, and each cause is to be separately stated and numbered."

1st. All causes of action which arise out of the same transaction or are connected therewith may be joined. Thus, H called A a thief and charged him with stealing a horse and had him arrested without process and imprisoned. A afterwards brought an action against H for slander and false impris-

onment—two causes of action, and the court sustained the joining upon the ground that the causes arose out of the one transaction.¹⁰

2nd. All contracts, written, verbal or implied.

3rd. All injuries to person and property, or either. This covers a broad range which in the limited space at my command cannot be discussed here.¹¹

4th. The fourth division includes causes of action for libel, slander and malicious prosecution.

5th. The fifth relates to the action of replevin.

6th. The sixth to actions of ejectment and the seventh to claims by and against a party in a trust company. In other words the code provides that all claims of the same nature or arising out of the same transaction in favor of or against a party may be joined in an action or pleaded as a defense, and in one action determine the ultimate rights of the parties in one action.

8th. Objections are made to the demurrer under the Connecticut code. That code was prepared in the year 1879 by the judges of the supreme court, and in the main is simple and systematic. An examination of that code fails to reveal the peculiarities spoken of by Mr. Russell, still no doubt they exist. They are peculiar to that state, however. In all the code states defects of form in a pleading must be taken advantage of by motion. Otherwise they will be waived. In all the code states but one or two a demurrer may be assigned for six causes, two of which, viz: want of jurisdiction or that the facts are not sufficient are general and the others special. We must remember that under the code the general rule is that an action is to be brought in the name of the real party in interest—the one entitled to the fruits of the litigation, and a party having an interest in the subject of litigation may intervene. Causes of action either legal or equitable or both may be joined either by the plaintiff or defendant—the design being to administer complete justice between the parties as far as possible.

9th. It is stated that "By the constitution, Art. 6, Sec. 5, and paragraphs 6409 and 6623 of Howell, the bench of judges are required to establish, alter, codify and amend the practice in law and equity in all cases not provided by statute," etc. It is claimed in effect that these and other provisions confer the power on the

¹⁰Harris v. Avery, 5 Kas., 146; see also Jones v. Steamship Cortez, 17 Cal., 487; Badger v. Benedict, 4 Abb. Pr., 176; Hamlin v. Tucker, 72 N. C., 502.

¹¹Maxw. Code Pl. 540 et seq.

court to abolish the distinctions between law and equity and adopt a code. Suppose we concede that power. It does not deprive the legislature of the authority to abolish the distinctions between law and equity and simplify the procedure. The objection in regard to the federal courts is purely imaginary. No difficulty is experienced in any code state on that ground except that in many cases the relief granted in the federal courts is much more restricted than it would have been in the state courts. There are very capable lawyers who have examined the matter and believe that no change in the constitution of the United States is necessary to enable congress to adopt code procedure, as the code does not deprive a suitor of a single right which he may have either at law or in equity. But even if such change is necessary still it is not a valid objection to the adoption of a code by any state.

Under the fourth subdivision of his article Mr. Russell says: "Our courts and law offices are gradually being abandoned as a means of settling controversies." It is evident therefore from this statement that the circuitous proceedings in the courts of law and chancery are too dilatory; and perhaps technicalities in too many cases are permitted to defeat justice. A remedy therefore seems to be necessary. What shall it be? The true remedy, brother Russell, is not to be found in abolishing trial by jury, but in the establishment of a system that will permit the real merits of the controversy to be litigated. The most feasible plan therefore would seem to be one whereby *justice* would be administered without denial or delay. The gentleman evidently mistakes the scope and effect of the code. A summary of the principles of the code is aptly set forth by Chief Justice Lake in *Wilson v. Saunders*¹² as follows:

"The code does not profess to abrogate that distinction which in the very nature of things must always exist between legal and equitable rights and remedies, nor to deprive any person of as complete redress for every conceivable wrong done to him in his person or estate as he formerly could have had. But it does require that whatever the nature of the right to be enforced or the wrong to be redressed may be, whether such as formerly would have been cognizable in either a court of chancery or a court of law the simple form of a 'civil action' must be followed, in which a plain statement of the material facts constituting the

¹² 4 Neb., 587.

cause of action, or the defense must be set forth in concise language and without repetition. Thus while the ancient forms of action are now abolished all the various remedies known to the law still remain, and are administered through the medium of the single 'civil action' of the code quite as certainly and much more speedily than they were under the former practice." The code is essentially a fact system intended to require the parties to an action to state the particulars of their respective claims. The pleadings are to contain a plain and concise statement of the facts constituting the cause of action or defense. Facts are to be pleaded and not evidence or conclusions of law, but the facts are to be pleaded as they are believed to exist so that the adverse party if he controvert them may be prepared to defend against the same. The jurisdiction clause, the interrogating part and charging part of a bill in chancery are swept away. The leading feature of the reformed procedure is the abolition of the distinction between legal and equitable remedies. All the different forms of common law action have been swept away as well as suits distinctively in equity, and in their stead is the civil action of the code wherein it is the duty of the court to apply proper relief, either at law or equity as may be required by the pleadings and proof. The facts constituting a cause of action or defense are to be stated in ordinary and concise language and without repetition, and the words employed are to be construed in the same manner as when used by intelligent persons. The defendant in his answer should set forth all his defenses whether they are legal or equitable, and if there is controversy between him and another defendant in regard to the subject matter of the action—as for the foreclosure of a junior lien—he may file a cross-petition and if need be bring a second or other defendant in as a party and thus settle the whole controversy in one action.

It is impossible to point out the great advantages of a code of procedure in an article of this kind. The fact that in fifteen years the system has been adopted by more than half of the states and in substance by England, India and many of the British colonies shows its excellence. In every state and country so far as we know it has been violently opposed by some of the older members of the bar, and has received the cordial support of the younger members. In 1866 an ex-judge of Ohio wrote a valuable work on code pleading, and dedicated it "to the young gentlemen of the bar." The dedication is very suggestive. Michigan is a pro-

gressive state. Some of the legal works of its great judges are to be found wherever the English language is spoken. Its great school has educated nearly one-third of the lawyers of the West. In almost every reform the state has been in the front rank. In the matter of administering justice, however, it is far behind the states and countries bordering upon it. When the merits of a code are presented, the answer is in effect: First, the laws are like those of the Medes and Persians and hence there can be no improvement, and second, we do not need it. This is the day of improved facilities for the transaction of business. Shall not such facilities be applied to the business of courts? The ox team express of two miles per hour has given place to the railway of forty miles per hour. The tri-weekly mail has been supplanted by one every few hours between important points. The telegraph and telephone annihilate time and distance and materially aid the rapid and successful transaction of business. A state might refuse to charter railroads, telegraph lines and other public agencies and plead a constitutional restriction to prevent the same. A state may no doubt enjoy a degree of prosperity without any of these, nevertheless its wealth and material prosperity would be greatly promoted by their construction. So in the administration of justice "a more excellent way" has been applied in many of the states for more than a third of a century by means of which the real rights of the parties to an action are adjudicated and justice administered without circuitry or unnecessary delay. That this is a greatly improved mode of administering justice we have the testimony of thousands of eminent lawyers and judges familiar with its operation, and we may surely assume that the time cannot be far distant when the progressive state of Michigan will not be behind its neighbors in its procedure in the courts.

THE AMERICAN (OR CODE) SYSTEM OF PLEADING.

E. F. JOHNSON.

The object of judicial proceedings is to ascertain and decide upon disputes, between parties, which are submitted to the courts. In order to do this, it is indispensable that the point or points in controversy be evolved and distinctly presented to the court for decision. The common law and the civil law have different modes for accomplishing this purpose. The American system is a new system. "It is the protest of an era of practical business-like methods against the refinement and subtleties of an earlier age."¹

Many of the rules of the common law and equity are freely used under the code. "It is assumed," says Judge Bliss, "that the student of the code is familiar with the common law and equity systems of pleading. If not, he is groping in the dark, and much that is offered will escape his apprehension. This knowledge is deemed essential, not only because well educated lawyers must know the history of our jurisprudence, must live through, as it were, and measure every step of its marvelous progress, but because the foundation idea of pleading is not changed."²

At common law, actions were divided into separate and distinct classes, each of which was distinguished in pleading by arbitrary forms that must be strictly adhered to, or the plaintiff must fail in his action. A plaintiff, for example, was not permitted to complain of a defendant "in a plea of debt" when the action should be called "trespass on the case"—he must follow the particular formula of each kind of action or be thrown out of court without a remedy and charged with costs, notwithstanding the fact that he had stated sufficient facts to show that he was entitled to some relief against the defendant.

In equity the rule was different. The sufficiency of the bill did not depend upon any technical formula or use of words or

¹ 18 Am. and Eng. Ency. of Law, 493.

² Bliss on Code Pleading, § 141.

phrases. It was in narrative form, and must contain a clear and concise statement of the facts upon which the right to relief was predicated.³⁰ Every pleading in equity must state facts in a simple and natural, but accurate manner, and is not to state evidence or admissions.⁴ In equity *all* the facts upon which the complainant relied for the relief sought must be stated; and no fact not stated would he be permitted to prove, however important to his right of recovery.⁵

It is important then that every material fact, to which the complainant means to offer evidence, must be distinctly stated in the premises; for otherwise he will not be permitted to offer evidence of such fact.⁶

At common law the parties are required to plead alternately in writing, until their respective allegations of affirmation and denial terminate in a single material issue, either of law or of fact, the decision of which will dispose of the cause. A failure to prove any of the essential facts presented by the pleadings was fatal to the action. This was not so in equity. In equity if enough of the facts pleaded were proved to entitle the parties to any part of the relief demanded, to that extent they were entitled to recover.⁷ These two systems of pleading were, at the time of the enactment of the code, separate and distinct. They were separated by well defined lines, that could not be crossed in the administration of justice, although to be considered and acted upon by the same judge and between the same parties. If a party complaining appealed to the equity side of the court, and his remedy should be at common law, he must go out of court, no matter how meritorious his cause of action, only to return with the same parties to have their differences adjusted by the same judge. The result was the same when the action was brought as a common-law action and the relief to which he was entitled proved to be equitable. The result of the code has been to obliterate these lines of distinction, so far as the rules of practice and pleading are concerned, and to consolidate the common law and equitable causes of action into one to be denominated a "civil action." The states which have adopted the code system of pleading have sought to

³ Story's Eq. Pl., §§ 26, 27.

⁴ Davy v. Garrett, 7 Oh. Div., 476.

⁵ Story's Eq. Pl., § 28.

⁶ Wilkes v. Rogers, 6 Johns., 566; Sidney v. Sidney, 3 P. Wm., 276; Clark v. Thurston, 11 Ves., 24.

⁷ Pom. Rem., § 527.

accomplish the object by abolishing the distinction between law and equity. These actions were blended and formed into a new system which should combine the principles peculiar to each, and be administered thereafter through the same forms and under the same name.

The lawyers of New York were the first to see that a reformed method of pleading would lessen the uncertainty of litigation and greatly expedite the ever increasing business of the courts and thus increase their business. The New York code declared that "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished, and there shall be in this state hereafter but one form of action for the protection or enforcement of private rights and the redress of private wrongs, which shall be denominated a civil action."⁸

The language of this code is as follows: "The distinction between actions at law and suits in equity, and the forms of all actions and suits heretofore existing, are abolished, and in their place there shall be hereafter but one form of action, which shall be called a civil action." Missouri was also one of the earliest states to adopt the reformed system of pleading, and uses the following language: "There shall be in this state but one form of action for the enforcement or protection of private rights, and prevention or redress of private wrongs, which shall be denominated a civil action." The California code provides that "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." Similar provisions have been adopted in nearly all the states of the United States. Although the names and forms of action have been thus abolished by statute, it must not be supposed that the time spent in learning the distinctions indicated by them has been spent in vain. The student of the code must remember that the more he knows about the common law and equity pleadings the easier it will be to become a thorough pleader under the American method.

The provision that there shall be but one form of action was not intended to abolish the distinction between law and equity. Such a construction would lead to infinite perplexities and endless difficulties. The innovation extends only to the forms of action

⁸ New York Code, § 69.

and the pleadings, while the technicalities of pleading have been dispensed with, and the plaintiff need only state his cause of action in ordinary and concise language, whether it be in debt, assumpsit, trespass or ejectment, without regard to the ancient forms; still the distinction between those actions has not been abolished, but remains the same. Causes of action, legal and equitable, have not been consolidated, and though there is no difference between the form of a bill in chancery and a common-law declaration under the code system, where all relief is sought in the same way from the same tribunal the distinction between law and equity is as broad as ever.⁹ The course of proceeding is now the same in both classes of causes. Whether the action depends upon legal principle or upon equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction.¹⁰

Resulting from this change in the forms of action is this very important principle: "A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. *He can be sent out of court only when upon his facts he is entitled to no relief at law or in equity.*"¹¹ A complaint which states a sufficient cause of action either at law or in equity is not demurrable as not stating facts sufficient to constitute a cause of action¹²

More and more the states which still hold to the modified common law practice are coming to recognize that the courts are instituted for the people rather than to furnish a form in which skilled lawyers may display their ability in discovering technicalities and thus delay and hinder the administration of justice. Judge Morse says "That for every malicious wrong there is certainly in this day and age, a remedy; and, under the liberal system of pleading in this state, *a plain and clear statement of the facts constituting the wrong is sufficient, and it matters but little in actions of trespass on the case, what the action is named or called.*"¹³

⁹ DeWitt v. Hays, 2 Cal., 463; Bournsted v. Bournsted, 23 Wis., 245.

¹⁰ Cole v. Reynolds, 18 N. Y., 74-76; Bowen v. Aubrey, 22 Cal., 566. New York Ins. Co. v. Nat. Pro. Ins. Co., 14 N. Y., 85; Wright v. Wright, 54 Id., 437; Williams v. State, 70 Id., 601; Stevens v. The Mayor, 84 Id., 296; Chinn v. Prentiss, 32 Ohio St., 236; Troost v. Davis, 31 Ind., 34.

¹¹ Grain v. Aldrich, 38 Cal., 514, 520.

¹² Barlow v. Scott, 24 N. Y., 40; Troost v. Davis, 31 Ind., 34; Leonard v. Rogan, 20 Wis., 540; Haniel v. Thompson, 3 Colo., 518; Herring v. Hely, 43 Iowa, 157; Whiting v. Root, 52 Id., 297; White v. Lyons, 42 Cal., 279, 288; Carpenter v. Brenhan, 50 Cal., 551; McPherson v. Weston, 34 Cal., 275.

¹³ Anteliff v. June, 81 Mich., 477.

We must remember that the changes made by the code do not affect the *rights* of parties or the *remedies* formerly given for a violation of those rights; but affect alone the *form* of action or the *means* by which the remedy may be obtained. The same facts that would have entitled a plaintiff to recovery at common law will entitle him to recover under the code, but, as we shall see when we come to consider the question of pleading, his remedy does not depend upon the *form* of his complaint or the *name* by which his action is called. He is entitled to just such relief as the *facts* stated in his complaint entitle him, whether the relief be legal or equitable.

The code has made a very important change in the rule for the construction of the pleadings. Under the common law every pleading was to be construed strongly against the pleader because it was assumed that he had stated his case as favorably as he could. Nothing could be inferred nor supplied by implication to sustain it. Therefore if a pleading was defective, either in form or substance, it was held insufficient.¹⁴ This rule has been abrogated by the code to this extent, that in construing a pleading for the purpose of determining its legal effect, its allegations are to be liberally construed.¹⁵

In *Farnsworth v. Holderman*,¹⁶ the court thus stated this rule: "The contract offered and read in evidence by the plaintiff was meagerly set forth in the complaint; and it is quite clear that under the common law rules of pleading it could not properly have been admitted in evidence; as under that system justice between the parties was often secondary to a strictly technical adherence to the doctrine that the proofs must correspond with the allegations."¹⁷ But recent statutes have displaced this system of technicalities, and introduced more equitable rules, requiring the allegations of pleadings to be liberally construed, with a view to substantial justice between the parties. It is sufficient if the complaint contain, in ordinary and concise language and reasonable certainty, allegations of such constitution facts as will entitle the

¹⁴ Gould's Pl., page 153.

¹⁵ *Trustees et al. v. Odlin*, 8 Ohio St., 297; *Oloott v. Carroll*, 39 N. Y., 436-438; *Bushey v. Reynolds*, 31 Ark., 657; *Shank v. Telple*, 33 Iowa, 189; *Morse v. Gilman*, 16 Wis., 504; N. Y. Code § 159; Cal. Code, § 452; *Allen v. Patterson*, 7 N. Y., 476; *Marshall v. Shafter*, 32 Cal., 176.

¹⁶ 3 West Coast Rep.

¹⁷ In the reign of Edward II pleading was already beginning to be perverted by niceties and formalities which had no practical utility. *Reeves*, Vol. 3, p. 62, note.

plaintiff to prove and maintain his case, and give the defendant the opportunity to meet and controvert the alleged facts relied upon by the plaintiff. To ignore this express command of the code by an adherence to the system which it was intended to abrogate, would be a wanton neglect of a plain rule of law and duty." The code rule "that the pleadings shall be liberally construed" does not mean that the omission of substantial averments should be disregarded.¹⁸ And the code will not assure anything in favor of a party, which he has not averred.¹⁹ Judge Maxwell in his valuable work on "Code Pleading," in discussing this rule, says: "This rule does not require the court to lean in favor of the pleader in lieu of its former bias against him, but requires the court to give the language employed its natural meaning and force, and every reasonable intendment and presumption is to be made in favor of the pleading. In effect to apply the same rule that it would to a contract—sustain it if possible."²⁰

No set form of words is now essential in the statement of any cause of action or defense. The pleader may choose his own language and state his case in his own way, if in so doing he confines himself to facts which are pertinent and material. Under the code, that pleading is best which states clearly in the fewest words the facts from which flow all the legal conclusions necessary to the support of the pleader's case. Skill in pleading is still an essential qualification of a successful lawyer, and a proper pleading is as important now as formerly, but the code regards the *substance* rather than the *form* of a pleading, and mere technical defects by which neither party could be prejudiced, have ceased to be important.

Mr. Baylies, in his work on "Code Pleading," says, "That since the enactment of the code, and the abolition of forms of action, every action is an *action upon the case* in the sense that it is founded upon the particular facts set forth in the complaint."

None of the states of the United States have strictly the common law system of pleading. In some jurisdictions the system adopted closely resembles that which was developed at the common law. The states which most closely resemble the ancient system are as follows: Michigan, Illinois, Maine, New Hamp-

¹⁸ *Spear v. Downing*, 34 Barb., 523.

¹⁹ *Cruger v. Hudson River Ry. Co.*, 2 Kern., 201.

²⁰ *Maxwell on Code Pleading*, 10.

shire, Vermont, Rhode Island, New Jersey, Delaware, Alabama, Mississippi, Maryland, the Virginias, Florida, Tennessee. In these states the common law actions still survive and special pleas are permitted. In Pennsylvania and Massachusetts they still keep the common law actions but do not permit special pleas.

Not only all the other states not above mentioned have adopted substantially the strict code or American system, but England, the mother of the common law, has adopted a reformed practice. The code states have abolished the distinctions in actions, torn down the wall between equity and common law forms and extinguished special pleas, except perhaps Georgia and Texas.²¹

Ann Arbor, Mich.

²¹ The codes of Iowa, Kentucky and Arkansas provide that proceedings in a civil action may be either ordinary or equitable. The plaintiff in these states may bring equitable proceedings wherever the chancellor, before the code, had jurisdiction, and *must* do so where that jurisdiction was exclusive. Code Ky.. §§5, 61; Gantt's Dig. (Ark.) 1874, §§ 4453, 4404; Iowa Cole, 1873, §§ 2507, 2508.

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NOTES.

ALTHOUGH money is as scarce among prospective law students as with any other class, and although a large number of those on their way to Ann Arbor from the west have stopped in Chicago to visit the exposition, yet there are enough already registered to indicate that there will be but little falling off in the attendance. There have been few changes in the corps of professors. The resignation of Prof. E. F. Conely is to be regretted. He was a popular lecturer and teacher. His successor has not been selected, but Alexis C. Angell, of Detroit, will temporarily partially fill his place, as lecturer upon constitutional law. The work of Prof. Johnson has been considerably increased, and hereafter he will devote his entire time to law school work. The law department begins another year in splendid condition. Prof. Knowlton has proved his ability as dean, and will continue this year the praiseworthy undertaking begun by him of raising the standard of the school.

The Harvard departure is not a remedy for the disease which has attacked the profession of the law. The plan of the Cambridge school may prevent some men of inferior capacity from entering upon the study of the law there, but at the same time it works injustice to those young men of brains and ambition whose circumstances have denied them a collegiate education and an A.B. degree, and who are infinitely better equipped mentally to enter upon the study of the law than a large percentage of the sons of aristocracy

and wealth who have managed with mediocre ability and the aid of a tutor, to squeeze themselves into the possession of an A.B. degree.

The Harvard idea seems to be to exclude all but a privileged class from admission to the practice of the law. The only American idea is to offer the opportunity to prepare for the profession to all without distinction, but to effect the purpose of the Harvard plan by an entirely different method; viz, to regulate the study of the law and (what is more important) admission to the bar, so that only those properly fitted and possessing the real and patriotic conception of the duty of the lawyer, be permitted to enter upon the practice of the law. In other words improve, and lengthen if necessary, the course of study at law schools, and throw increased safeguards around admission to the bar. It is a trite observation that, in every city, town, and locality, the high school or academy graduate is found as frequently as the college graduate among the ablest members of the bar.

AT the risk of subjecting ourselves to the criticism of devoting our pages almost exclusively to papers and addresses upon codification, we have submitted two articles in this number upon that subject. They are, however, widely different in their treatment. Chief Justice Maxwell, of the Nebraska supreme court, who is the recognized champion of the code in the west, and who is probably as well informed upon its history, workings and theories as David Dudley Field himself, deals with the objections to the code which were so forcibly presented by Alfred Russell of Detroit, in the paper read by him at the last meeting of the Michigan State Bar Association. The venerable justice pays Mr. Russell a flattering compliment when he says that the latter's paper is the ablest and strongest argument against the code that he had ever read. Justice Maxwell's article is very entertaining.

Professor Johnson's article is intended for the students of the law school, and it serves its purpose admirably. The writer has had assigned him the duty of teaching code pleading, and his paper is an excellent preliminary lecture which those students intending to take the course under him will do well to read and study carefully. The indications are that Professor Johnson will have a very large class in this subject. The importance of a knowledge of code practice and pleading cannot be too strongly emphasized. The code is making such rapid strides in this country that even those intending to locate in states where the common law practice still prevails in modified form, cannot afford to neglect the opportunity to become familiar with the principles and theories of code pleading and practice.

ALTHOUGH it has been a number of weeks since Michigan was the scene of a brutal exhibition of lynch law, yet it may not be

inappropriate to revert to the disgrace long enough to quote the forceful words of Chief Justice Bleckley, of Georgia, who delivered an address before the state bar association of that state upon "Emotional Justice." In the course of his address he uttered the following sentiments, and we wish our circulation was large enough to carry them to every inhabitant of the state of Michigan:

"One of the most urgent needs of our times is an earnest, temperate, judicious and persistent remonstrance from the bench, the pulpit, the press and the rostrum against emotional justice. . . . Murder is none the less wicked because perpetrated by a crowd. Nothing would be needed to convert a state into a colony of criminals but that its mobs should be large enough and numerous enough. Whoever is unwilling for the whole state to become a mob, ought to be unwilling to encourage or share in mob violence. . . . Mobs have no mission and can render no reason for their existence. Nor would they exist if we would silence their well meaning, but deluded, advocates and apologists. Especially would it be serviceable to alter the tone and teaching of those public journals which confound the mob with the people, and treat some, if not all, instances of mob violence as deeds in which the people act in their own behalf and take justice into their own hands. Nothing can be more manifest than that a mob, as such, is not the people as a political society, nor even any part of the same. To become a mob, and do its work, those who compose it must, for the time being, secede from organized society, outrage its most fundamental principles and trample on its institutions. If society has any law or ordinance that has been proclaimed throughout the civilized world, and that everywhere prevails as binding authority, it is that no man shall be condemned without a trial, and that no trial can be had save through governmental agency and in some pre-established method. Such rules are imposed by society for its own observance as well as for observance by all its members. Neither society as an aggregate nor any nor any number of its individuals, can take justice in hand, or have any hand in justice, except by the means and in the manner prescribed by law. . . . Children already born may live to see mobs mobbed; large mobs may execute smaller ones; mobs of one race may rise up against mobs of another race; mobs of bad men may become as numerous and more terrible than mobs of good men; brute force, through a long and bloody period of disorder, may reign supreme!"

THE HARVARD DEPARTURE.—The announcement is made that Harvard College, commencing with the collegiate year 1895-96, will raise the qualification for admission to its law school so that none but students upon whom have been conferred the degree of A. B., or its equivalent, by first class colleges, can enter the

school. There can be no question but that the standard of refinement and education among American lawyers needs elevating, but there will undoubtedly be a difference of opinion among educators as to whether the course that Harvard is about to pursue will produce the desired results, or is even in accord with the spirit of American institutions. There are not a few who aver that the authorities of Harvard will, by this step, be creating an aristocracy of education, and they censure them severely for their departure from the popular conception of what should constitute free education in this country. Harvard's answer to this criticism would probably be that the mission of their institution is not to furnish free instruction or even to render it possible for those of modest means and limited opportunities to equip themselves for the practice of what should be, but is not, the noblest of professions.

Our own opinion is that Harvard's intentions are commendable enough, but its method is too heroic. The tendency of its new rule is to bar from the study of the law under the direction of experienced instructors, men of capacity and ability, and men who have not been so fortunate as to have enjoyed the luxury of that special collegiate education which entitles the student to the degree of A.B. Of course, Harvard furnishes a very small proportion of the graduates of the law schools of the country, and there are numerous other schools as well equipped and officered as Harvard, from which a choice can be made by young men of moderate worldly endowments. But the old New England institution is, we believe, adopting a plan that will lead many, especially those who can see no error in any course pursued by "Fair Harvard," to believe that the only thorough legal education is that which has for its corner stone the ornamental degree of A.B.

Many law journals have already loaded down the authorities of Harvard Law School with fulsome praise because of the adoption of the new requirement for admission there. They have endorsed the radical departure undoubtedly because their editors are in honest sympathy with its purpose; viz, to raise the standard of culture, refinement, and fitness among the profession in this country, about the necessity for which there can be but one opinion. But we apprehend that legal journalists will not be so enthusiastic in their endorsement of the Harvard departure when they come to realize what it really means.

The possession of an A.B. degree does not mean that the student enters the law school with a prior knowledge of the law. It does not necessarily mean that he will be able to make faster progress than the young man who comes to the school well equipped with partial college, an academy or even a high school education. It may mean, however, that the finished product of a law school, where such a rule as that proposed by Harvard obtains, may be more cultured or higher polished than the more rugged

graduate of a law school where no such barrier to admission is raised. What is sadly needed, however, is some of that honest pride in preserving the honor and good name of the profession of the law which seems to be disappearing with those fine "old school" jurists. It is not the ability to quote Latin and Greek or to converse about ancient myths that is going to raise our profession until it is again regarded as "the bulwark of the people's liberties." The expectation is, of course, that those who have enjoyed the advantages of a higher education will the better appreciate the necessity of elevating the tone of the profession, but we believe that rugged honesty of purpose, rather than polished elegance, is needed to restore the lofty conceptions of the duty of the lawyer which prevailed during the early half of this century.

JEROME W. TURNER, of Owosso, has given the subject of proposed immigration laws considerable careful study, and the following suggestions which he makes, as to one of the safeguards that ought to be thrown around admission of foreigners to the full privileges of citizenship, are of interest. He writes:

"For the purpose of proper legislation respecting the amount and character of future immigration, it is evidently impossible that it should be along the lines of religious belief. But in this view, religious belief must be defined to be such as neither requires nor results in relational injury to the individual or the state. In this sense it is an absolute right. But with a man's political notions the proposed immigration laws should have everything to do. And when we come to their application, it must be held that political opinions are not merely such as pertain to the organism and constitution of government, but to all the details of legislation designed to protect person and property within the state. It must be assumed that every man upon whom this legislation is designed to act, already entertains political opinions consonant to the design embodied in our system in all its generality and in every particular. In this view there will be no harm to be complained of in requiring an affirmative belief in our polity and the body of its laws, and that one who has not such opinion must be made ineligible to even residence, for the short time required before acquiring citizenship.

The state is only a larger society. No private civic organization admits a man within its pale until he has given an intelligent assent to its general character. He cannot go to the ante-room, much less enjoy any of its special benefits. As it is now, a person can come into our great national family and enjoy almost every absolute and relative good to be derived from it, without acknowledging its authority or subscribing to its character and purpose. It constitutes what may almost be termed a *casus omissus* in the requirements of our system. There is nothing now to hinder any foreigner from coming here, owning property, and claiming all

the protection of a body of laws which he despises. Some one may say that so long as a man holds a mere inward belief respecting our laws and institutions, no matter how inimical it may be, it cannot be made a subject of legal cognizance. That is only true to a degree. The law has a right to establish certain tests of denizenship, as well as citizenship. Every human society has a right to protective rules. The body politic may put out its hands, like the natural one, to avoid danger. Its justification is its own right to exist, and the still further fact that every proposed resident is an applicant for its favors. It is evident therefore that every person who comes to our shores with such an *animus manendi* as is involved in residence, must be met somewhere upon the threshold with a legal challenge of his political belief. If he would stay he must say. But as men can readily say anything that suits their convenience, he must be made to speak under the pains and penalties of perjury, if it should afterward appear by competent evidence that what he said was wilfully false. Nor will a formal oath be sufficient, for it is the misfortune of administering it, that its mere repetition instructs the administrator as to what he shall say, without furnishing any evidence as to his intelligent belief. There must be some method of examination under oath. This examination should be 'taken down' and preserved, and where it is satisfactory should always contain a declaration of intention to become a citizen, and not a day of residence should it be deferred. And there is no reason why all these safeguards should not be employed in the case of involuntary immigrants, or political refugees. This should be so not merely because they are apt to be a class of malcontents, but because there is every reason that applies to other immigration besides. And it is to be remembered here that in its original there was no such thing as 'right of asylum,' as the phrase goes. It needed affirmative action and consecration. It is also of special interest in this connection to remember that Tiberius Cæsar found it necessary to wholly destroy the privileges of the *asyla* because they were abused by debased and villainous persons!"

LAW SCHOOL NOTES.

E. F. JOHNSON, EDITOR.

H. C. WALTERS, ASSISTANT.

Judging from the number of applications and the correspondence which Prof. Knowlton, the Dean, has had during the past few months, the attendance at the law school the coming year will equal if not exceed that of any previous year, notwithstanding the stringency in money matters.

The librarian has reserved eight seats in the lecture room for ladies, and he says they will all be taken. Four of them are already here preparing for the work..

The "Practice Court" promises to be a very popular feature of the course in the future. The members of the faculty have had many letters from those who graduated last June, expressing the great benefit which they received from the practice court of last year.

Many members of the class of '93 have already received much notice and success in their respective localities.

Jo. E. Baird, '93 law, has received the nomination for clerk of the courts of Wood county, Ohio, and his friends say that he will be elected by a handsome majority. Mr. Baird is remembered here as one of the best men of his class.

B. B. Crawford, law, '83, is at present deputy county attorney of Lincoln county, Oklahoma.

L. B. Daune, also of the class of '93, is located at Denver, Col.

Porter W. Fleming writes that he has a good prospect before him at Phoenix, Arizona.

W. M. Beggs, '93, who is located at San Jose, Cal., has been very successful so far. He writes that he has several cases in the courts of record of that state.

F. G. Calhoun and G. A. Johnson, both of law '90, have recently formed a partnership and located at McKeesport, Pa.

The members of the classes of '90 and '91 will be interested in knowing that Guy A. Thompson and Ira E. Butterfield, who are located here, have each formed a partnership for life without any mental reservation or secret evasion of their own whatever, pertaining to the duration of said partnership. Mr. Thompson and Miss Alice Whitney Beckwith were married Sept. 6, 1893. Mr. Butterfield and Miss Amy Iola Dunklee were married Sept. 14, 1893. These gentlemen are to be congratulated. Miss Beckwith and Miss Dunklee are well known society ladies.

BOOK REVIEWS.

CASSODY ON WILLS.—By John B. Cassody, LL. D., Professor of Constitutional Law in the University of Wisconsin. St. Paul: West Publishing Co.

This work is a series of lectures upon the law of wills, delivered before the students of the College of Law of the University of Wisconsin. The writer is a justice of the Supreme Court of Wisconsin, as well as a lecturer. The lectures were placed in book form in response to a generally expressed desire of the alumni of the college of law of the University, and the work is appropriately dedicated to the alumni. Justice Cassody manifested his confidence in the ability of the editorial force of the West Publishing Company by entrusting entirely to that company the work of compiling the index, notes, and tables of cases and contents, and the thoroughness and accuracy of this work demonstrates that his confidence was not misplaced. The editorial staff of the West Publishing Co. is trained in just that kind of work. The preparation of tables of contents and indexes of all law text books would be more serviceable if left to the skilled direction of publishing companies as well equipped as the one at St. Paul.

The main criticism of Justice Cassody's work is that too frequent reference is made to the Wisconsin statutes, but after all this objection is not a very serious one, inasmuch as the law of wills is practically the same in all the states, and the statutes vary only in slight and unimportant particulars.

The principal virtue of the book is the simplicity of its arrangement. It is, of course, intended chiefly for the instruction of students, but it is, on that account, none the less valuable to general practitioners. For specialists in probate law, the larger and more complete works are more serviceable, but Justice Cassody's book occupies a field of its own, and supplies a want which has heretofore remained unsatisfied. The most admirable chapter in the work, or rather the one of greatest practical value, is that upon "probate jurisdiction." The appendix presents the English statutes, which serve as a basis of the laws of wills in the United States, including the statutes of Victoria. This is one of the admirable features of the work.

NATIONAL CONSOLIDATION OF RAILWAYS IN THE UNITED STATES.—By George H. Lewis M. A., of the Des Moines, Iowa, Bar. New York: Dodd, Mead and Co.

The problem of government ownership of railroads is one so vast and so important, and there has been so much written upon it in newspapers, periodicals and books, that considerable courage is required nowadays to place a new work on the subject before the public. There is much that has been written that is worse than useless, and there have been those who have helped to befog the public mind, who have been utterly unqualified to pronounce an opinion upon the question. It has seemed that those who have had the fewest opportunities to observe the inner workings of the

great railroad systems of the country, have been the first to force their one-sided views and immature opinions upon the reading public.

The national consolidation of railways is a great question, and one that only the most thorough student of railroad problems has any right to handle. Railroading, the management and operation of railroads, is one of the sciences, and should be dealt with as such. If a chemist should write and publish a text book upon the law of resulting trusts, it is useless to state that his work would be treated with contempt and its publication be considered *prima facie* evidence of the insanity of the author.

We have made this long digression in this review because when we express it as our judgment that Mr. Lewis's treatise is entitled to the highest consideration as one of the very few works upon the subject to which is due any respect from the thinking public, we wish to be understood as paying it the highest compliment that is possible in view of the almost utterly hopeless prospect of settling the problem at the present time.

Mr. Lewis is thoroughly qualified by years of study of the question, by patient analysis of its many sides, and by long and familiar acquaintance with the practical as well as the theoretical management of railroads, to prepare and submit a plan for the correction of the evils of private ownership. We cannot pretend to enter into a detailed explanation of his plan in this review, and, at the same time do it full justice. In order to arrive at a correct understanding of his remedy, it will be necessary to read the book itself. The remedy is not necessarily a complex one. On the contrary it is very simple, and because of that, will unquestionably be met with numerous objections. It is almost too trite to observe that everything radically new meets with emphatic opposition, and hence we will not be surprised if Mr. Lewis's book should be widely criticised.

The public, and more especially those in commercial life whose occupations lead them into direct contact with railroads, are familiar with all the evils which have resulted from private ownership of railways. Railroad wars resulting in the disarrangement of the business of communities, unfair discrimination in freight rates, strikes, the influence of the great railroad corporations in politics and upon legislation, and carelessness or negligence in providing safety devices, are all traceable to private ownership, or what is more to the point, would be less likely to exist if government ownership of railways should obtain. These are the evils or some of them, and Mr. Lewis proposes a remedy which can better be briefly explained in his own words. He says, in the introduction to his book: "The purpose of this book is not to find fault with railroad managers and not to stir up the animosity of the public against the railroads, but to propose a definite and distinct plan to remove the evils of the present system. This plan is national consolidation through the formation of a great national railway corporation owning and controlling all the railways of the country, and governed by an organization representing the state and national governments and stockholders owning the road."

Mr. Lewis does not claim that his plan is perfect or beyond criticism. What he has to say, however, will be carefully and respectfully read, and his book cannot fail to be productive of great benefit and material assistance in arriving at the correct solution. Even to those who greatly disagree with him the work is valuable, because it contains material in the shape of figures and statistics which have been collected at considerable trouble and expense, and some of which has never before been placed before the public.

CORRESPONDENCE.

CRITICISM OF TWO SUPREME COURT DECISIONS UPON THE STATE
LIQUOR LAWS.

To the Editors of the Michigan Law Journal:

One of the justices of the supreme court is just now engaged in the very laudable undertaking of bringing the people of the state to a full appreciation of their duties in respect to the enforcement of the laws regulating the sale of intoxicating liquors. In the course of this effort he delivers public addresses calculated to arouse the citizens of the state, and particularly those holding official position, to a proper sense of the evils of the traffic and of the obligations which rest upon them to see that it is confined strictly within the limits of the law. Has it ever occurred to this justice that possibly one of the obstacles in the way of the complete enforcement of the liquor laws may be found in the supreme court itself?

In the case of *Kuhn v. the Common Council of the City of Detroit*,¹ decided some four years ago, that portion of the act to regulate the sale of liquors which provides that the bond required to be given by every dealer before entering upon the business shall have annexed thereto an affidavit of each surety, "which affidavit shall state that the affiant is not engaged either as principal, agent or servant in the sale of any liquors mentioned in the act," was under consideration. A liquor dealer in the city of Detroit had offered a bond to the common council for approval with Kuhn, who was a liquor seller also, as surety, and omitting from the affidavit the portion above referred to. The council rejected the bond in accordance with the provisions of the law; whereupon Kuhn, the proposed surety, applied to the supreme court for the writ of mandamus directing the common council to approve the bond of his principal.

The reason of the prohibition in the law is well understood. Saloon keepers were accustomed, before it was forbidden, to become sureties for each other, and the giving of the bond thus became very little restraint upon their actions. An outside party standing in the position of surety would be expected to exercise some degree of restraining influence upon his principal to keep him within the limits of his legal authority, but when the sureties were themselves engaged in the same business, they were expected to stand by each other in violation of the law, and they connived to evade its provisions whenever they could profit thereby. The state had therefore required other sureties than saloon keepers

¹ 70 Mich., 535.

because it was necessary to the accomplishment of the purposes of the law, and the police power of the state was supposed to be amply sufficient to warrant the restriction.

The court entertained the application of the proposed surety though it does not appear from the case how he could have been injured by the disapproval of a bond upon which he had assumed a voluntary obligation; and not only so, but they discovered in deciding the case a violation of an important provision of the constitution of the United States and granted the writ prayed for. The fourteenth amendment to that fundamental charter of government provides that "No state shall deprive any person of life, liberty or property without due process of law;" and by some process of reasoning not fully explained in the opinion, it was found that the right to become surety upon the bond of another person was a property right.

Without stopping at this time to examine this peculiar species of property or to inquire by what means, if at all, it can be made to have property value for the party possessing it, I pass to the reason assigned by the court for holding that in the case of a saloon keeper, it cannot be taken away from him, nor even limited to other than liquor bonds, by a mere legislative prohibition. "The right," says the court, "to sign a bond, or to enter into any other contract, cannot be made to depend upon the business in which one is engaged. The right to sell liquor in this state is made lawful under certain conditions and restrictions by the act itself." And it is because it is made lawful apparently that the court holds that persons engaged in it cannot be inhibited from going upon bonds of a certain class. In other words it is manifest that the court understood this business to stand upon precisely the same footing with any other lawful business, and, as the professor or the lawyer or the physician might sign such bond as he saw fit so a saloon keeper might rightfully and under the protection of the fourteenth amendment to the constitution, become surety for a man engaged in selling intoxicating drinks.

Now the fundamental error in this decision seems too obvious to require any discussion. The right to sell liquor under the law does not stand upon the footing of other lawful business. It is made exceptional by the law itself and always has been in this state, so exceptional that it is deemed necessary to impose upon it very strict restraints which before the making of this decision were never supposed to be in conflict with the constitution. The law discriminates against the business and treats it as one that needs to be surrounded by special guards; as one that is the foundation of many evils, as one that ought not to be suffered to exist except after the performance of conditions as well calculated to restrain it as any that could be devised, as one that must even be limited to certain hours and removed from proximity to certain public institutions, and as one upon which it was perfectly proper

to impose exceptional taxation. It was at one time wholly prohibited in this state and there is little doubt that the people of Michigan to-day would re-enact prohibition if they believed that the law would be enforced. It has been made one of the conditions therefore to the lawful carrying on of the business that a bond should be given signed by other than saloon keepers as sureties. This simply has the effect to take away from saloon keepers the privilege which they would otherwise have of signing liquor bonds as sureties. If this restraint is illegal because thereby a property right is taken from them, still more is it illegal to impose the special tax, for that is imposed upon this particular business and not upon those whose legality does not depend upon compliance with statutory conditions. If it is unconstitutional to forbid a saloon keeper to become surety on a liquor bond, then it must be unconstitutional to require his place of business to be closed at certain hours and to forbid sales to minors and certain other classes; every limitation upon the conduct of the business and every condition established as one precedent to entering into it must be equally violative of constitutional right. In short the state by the fourteenth amendment to the federal constitution, is wholly deprived of its power to deal with this business differently from what it deals with others and the police power of the state, to which the court makes no allusion whatever in the opinion, must be itself of little or no importance. But it is noticeable that in the case of *People v. Phippin*, decided by the same court less than two months before, in an opinion written by the same justice who wrote in *Kuhn's* case, the police power was held, after an extended discussion of the cases decided by the supreme court of the United States touching the clause of the fourteenth amendment now in question, to be a general power possessed by the several states of the Union "by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state." "Whatever differences of opinion," says the court, "may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and public morals." But if its exercise may be nullified in a case like this, it may in almost any conceivable case and on a pretense equally plausible. If a party proposing to enter into this business were to refuse to pay the license tax demanded from him and to plant himself upon this opinion, it is difficult to see how the court would be able to distinguish his case from that of *Kuhn v. The Common Council*, except that his right to constitutional protection would be much the plainer, for the right to carry on business is unquestionably a property right while the property right in the privilege to go surety for the liquor sales of another seems at least to be questionable.

The court in this case fully recognizes the fact that the sale of intoxicating liquors is only a legal business when the conditions prescribed by law are fully complied with, and yet it seems to have overlooked altogether the fact that by compelling the common council to receive the bond of Kuhn's principals, it was itself nullifying one of those indispensable conditions and permitting him to enter into the business with one of the indispensable conditions not performed. The decision is all the more objectionable from the round about course adopted to nullify the statute.

It has become a common thing now for saloon keepers to become sureties for each other on the bonds they give in entering into business, and the bonds are of little or no value in consequence of this decision.

The more recent case of *People v. Wheeler*, in which a person summoned as a juror in a case where the defendant was prosecuted for selling liquor on Sunday is also one that may hereafter lead to mischief, though possibly in the terms in which it was decided, there may be found nothing of which special complaint shall be made. A person was called as a juror, who, being examined as to his qualifications, admitted that he had a prejudice against persons engaged in the liquor traffic. He was questioned at some length and repeated two or three times that he was down on liquor selling anyway whether legal or illegal, but he did not think that would prejudice him against the defendant and against her testimony, for instance if she should be sworn as a witness. The circuit court held him competent as a juror, but the supreme court reversed the judgment for that cause and for that alone.

Now I call attention to the fact that the prejudice against the business of selling intoxicating drinks is the justification for all the conditions and limitations that are imposed upon that business. It is a prejudice that grows out of the knowledge that the evils are simply enormous, and they come home to every neighborhood in such a manner that every right thinking man feels them. Our legislators have always felt them, and acting upon that feeling they have done their utmost to restrain the vicious traffic. If those who have a prejudice against the traffic cannot sit as jurors in cases where violation of the laws which restrain the evil trade is charged, then the great majority of the right thinking men in the state cannot sit as jurors in these cases, and the case of the unfortunate widow whose son has lost a limb by reason of the unlawful sale to him of intoxicating liquor must be judged by a jury of men who belong with that class who see fit to engage in a business which is found by experience to be most profitably conducted behind a screen to hide it from public view, and whose evil consequences make stringent regulations necessary. The people who are prejudiced against the liquor business are the people who have caused the law to be enacted under which she seeks redress for the wrong done her; and they are the proper judges of its alleged

transgression. If prejudice against the business shall be held a disqualification to a juror, the charge of violation is left to be judged by the very persons who alone are the object of its provisions or those who are in harmony with them. We may as well at once repeal all our liquor laws and throw the trade open to any one, leaving him to conduct it as he pleases.

And I desire to call attention to this fact when the qualification of jurors are under consideration, that there is no law to determine that favoritism or prejudice shall constitute an exclusion, but it is certain that the same facts that will constitute a good objection to a juror will constitute a good objection to a judge also, and if the juror in the case mentioned was not competent to sit in the case, then a large portion of the circuit judges in the state are not competent to sit on the trial of liquor cases, nor are some of the judges of the supreme court competent to sit on the hearing of the writs of error in such cases. Many of these judges, we understand very well, are down on the liquor traffic, and while they believe, and will honestly say, that they would do justice to any man brought before them on a charge of illegally selling intoxicating drinks, yet they must and will admit, if they frankly speak their true sentiments, that they are prejudiced against every man who engages in the traffic; that is to say, the very engaging in the traffic deprives him to some extent of the respect they might otherwise have for him as a man. This is inevitable, and I may say it is inevitable in the case of every thorough-going temperance man. He is down on the liquor traffic and he feels that every man who engages in it to some extent debases himself. That was doubtless all that the juror in question meant to be understood when he was interrogated.

The fundamental error is found in the ruling in *Kuhn v. The Common Council* for that, in effect, denies to the state the power to make and enforce police regulations. One of the most important and necessary constitutional powers of the state is thereby denied, and, in the case of the liquor traffic, effectually nullified. The fourteenth amendment to the constitution of the United States was never intended to interfere with or restrict the essential powers of sovereignty of the individual states and no power is more essential or more undoubted than that to bring the occupations of the state that are peculiarly subject to great abuses, under strict and efficient regulation.

If the supreme court itself were to use the same degree of vigilance in the application of the law upon this subject that the people have used in its enactment, it is believed that the undesirable traffic in intoxicating liquors might be kept more nearly within the limits of its provisions.

“*Balthazar.*”

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CAN THE COMMON LAW BE CODIFIED?

WESLEY W. HYDE.

"The soul of the law is as absolute a thing as your soul, and your body would be food only for the worms if the soul were fled."¹

There is perhaps nothing more striking in the social phenomena of the present than the great and increasing reliance upon, and faith in, the law making power. In every branch of government it is apparent. Is there a depression in trade? Then congress must pass a law to provide a remedy. Are we threatened with cholera? Our sure bulwark against its invasion, is a varied assortment of legislative enactments. Does corruption exist in municipal government? Then let the legislature provide a few more checks and create a few more offices and all will be well. Are the relations between labor and capital strained? Then legal enactments will prevent inflammation and produce healthy relations. The same idea is expressed by the Secretary of the Michigan State Bar Association, in his last annual report, when he says: "What is necessary to be done to galvanize the Michigan State Bar Association into life is to adopt a new constitution," etc., meaning, I suppose, that a new constitution would have some quickening, vivifying power.

A further development of this notion is seen in statements like the following, quoted from the last number of the MICHIGAN LAW JOURNAL: "A system of codes like those in California if adopted in all the states, under our form of government of written constitutions, will save our public from ruin and decay, because the people who are the source of power and the true sovereigns of the public could thus learn to know and respect the laws. With a

¹ Bishop on Marriage, Divorce and Separation, xxxiii.

perfect system of codification of state, national and international laws, *such as California has obtained*, we might reasonably expect for the coming of that golden period yet hidden in the womb of time, when the universal law of 'peace on earth, good will to men' shall govern all enlightened states and nations; and with the happy poet, we could exclaim," etc., says Mr. W. H. H. Russell in an article entitled "California Codes:" "Had the laws of Rome never been promulgated in codified form or promulgated in less efficient form, I thoroughly believe that they would have been forgotten with the songs that the Romans sung. . . . In England the constitution is a direct outgrowth of English history, while American history is determined largely by the constitution. One is largely the effect, and the other is largely the cause." "I maintain that the knowledge of the British constitution cannot be acquired without previous knowledge of British affairs from the beginning; not so with us, for instead of considering as evidence all possible theories and precedents, we have made one rule clearly the law," says Mr. Sutton in an article entitled "Michigan should adopt a Code of Civil Procedure." And Mr. Russell also says: "From the *genesis of the law* as found in the ten commandments and the twelve tables of Roman civil law, we may trace the evolution of the law down through the ages to the constitution of the United States, and states, and the California system of codes." "With such systems as California presents there would come to each and every state new strength and vigor and better state life."

This conception of the effect of state enactments of law, when we come to think of it, is opposed to every fact in the history of progress. Where is the selfishness of man more strongly felt than in legislative bodies? In enactments of states governed by kingly power, it is beyond question that the main motive is the benefit of the king and nobility at the expense of the rest of the community. Where the people rule, the principle of the "greatest good to the greatest number" is habitually overlooked and ignored to the advantage of special interests, and in popular legislative bodies it is notorious that the average of ability and character is so low that thoughtful, honest and useful legislation can hardly be expected. One of the curious things about it is, that while we rely upon legislation to cure nearly all the ills of life, we at the same time recognize the futurity of expecting anything very useful from such a source. Indeed our popular legislative bodies have become a by-

word among the people, and we are oftener heard apologizing for than praising them. If the people would bear in mind the fact that legislators are but human, and that under the best conditions their ability to grasp all the elements of complicated problems of sociology is no greater than that of the average citizen, we would cease to expect any better results. The homely maxim "what is everybody's business is nobody's business" is applicable to public legislation.

Private business and the ordinary affairs of the community could not go on if their control were delegated to individuals without special training and knowledge; society would become disorganized if the principle which we apply to public affairs should be applied to the ordinary affairs of the community. "God helps him who helps himself" is the principle upon which we attend to our own business and perform our own duties; but in public matters this idea is entirely ignored, and the important questions which arise in distinctly public matters are left to men without special training or knowledge, and of less than average ability and character. And yet, with such materials, the learned lawyers quoted above expect the golden age to be specially created; that a perfect and complete body of laws will suddenly come into existence; and that thus, and thus only, can the body politic be preserved from decay. To find the genesis of this belief in the omnipotence of legislation, it is necessary to go far back in the history of man, when men believed that their chiefs or kings became gods at their death, and that during life they ruled by heavenly wisdom.

Further along in the history of the race, it was maintained and believed that the king ruled by divine right; although the belief that he was himself divine, had been abandoned. But now these old beliefs are exploded, and the source of wisdom that actuate legislative bodies is seen to be decidedly mundane. Therefore the belief in and the reliance upon legislative wisdom as being greater than that of individuals making a legislative body would seem to have no foundation.

But it may be replied that it is not proposed to authorize the legislature to codify the laws, but that the best men and most eminent jurists shall be selected for that duty, and that these men are entirely competent for the task. Merely noting by the way, that practical difficulties in the majority of instances prevent a selection of the best men for any particular public duty, I wish to say that probably if the very best and most learned men in the

country were selected, their efforts in codifying the common law, would not be successful. Without pretending to speak with any special knowledge, yet as far as I am informed, past efforts in codification have been failures; that when it has been attempted to simplify by codifying any branch of the law, the result has been to make it more complicated, uncertain and harder to understand.

Those who believe with the learned gentlemen, from whose articles I have quoted above, that there is something magical in public legislation and that official enactments of law may be the source from which shall flow all the blessings that we desire, evidently do not believe that society is an organism, and that the laws and customs of this organism are the mere results of organic life and not the causes of it. Mere *phenomena* of the social organism, in the same sense that speech is said to be a phenomenon of the human body, or that heat is a phenomenon of the sun. If society is a growth, if it has been evolved and developed, then its laws and customs must likewise have grown up; and to qualify one for the labor of codification of its laws and customs, a complete knowledge of all the intricacies of the organism called society is necessary. This is probably impossible to attain. Among the sciences that of sociology is thought by specialists to be the most difficult; because it is more obscure, more abstract and its laws are yet largely undiscovered, and because it involves a study of human nature and the human mind. And yet the simplest of the natural sciences is so complicated, so little understood, and so far reaching in its operations, that no scientist would undertake to make a code of the laws relating thereto.

The reference by Mr. Sutton to Linnaeus and his classification of the vegetable kingdom, is particularly unfortunate from his standpoint. In the first place Linnaeus was not a public functionary, but was a scientific investigator and observer; his was among the earliest efforts to classify the vegetable kingdom, and it was not a code of laws at all. The Linnaean classification in botany was as stated, one of the first, and in his time Linnaeus was the most eminent botanist, and doubtless would have been selected by the wisest, as the proper person to make the classification; and yet his classification was soon shown to be not only imperfect and inadequate, but also erroneous; and among modern botanists and specialists in different fields of botany, an attempt at classification is still going on, and is far from being perfect. These modern botanists however are not public officials and have

no commission from the state. They are men who have devoted their lives to the study, not of the whole field covered by the science of botany, but of special and restricted tracts thereof.

The same sort of classification has been going on in the field of law since before the time of Moses. And the ten commandments found in the Bible attributed to Moses, are found in almost the same form in the records of other nations, showing that he was not the "first law giver" even if he did promulgate that code. The history of the law in its earlier stages is largely made up of commentaries of unofficial writers. Blackstone and Kent are the last that have attempted to cover the whole field of the common law. Since then the work of classification by way of commentary has been greatly divided and subdivided, until now we have monographs upon a very large number of different topics, and the tendency is to further subdivision. These commentaries are written, as a rule, by learned specialists in each department; and yet their classification is still imperfect and far from complete.

The decisions of courts of justice is a further attempt at classification. And the difficulties of classification are nowhere more apparent. Judges are, or ought to be, learned lawyers, and yet with all the assistance supplied by concrete facts, able counsel, precedents and commentaries, there is a constant conflict of decisions and the same court frequently reverses itself.

A further classification is being carried on by means of legislative enactment; but this method is so imperfect that at each session of the legislature of the different states, and at each session of congress and parliament, the work of repeal is fully as great as that of enactment; in other words, legislative enactments of law are, probably, at least half of the time, so full of blunders and mistakes and so injurious to the community, that each succeeding legislature hastens to undo what has been done, and then proceed to blunder some more. It is said by Mr. Sutton that each lawyer who obtains any knowledge of the law, is himself a codifier; and this is measureably true. But as a case arises with its new array and complication of facts, the law has to be shaped and applied to these facts; and it is impossible to do this in advance, because of the immense variety of complications in social life. If then the labor of commentators, jurists and lawyers under the most favorable circumstances, viz.: in pursuit of reward, and in the actual affairs of life, are so imperfect, how much more must official codes, shaped by relatively inexperienced men, be imperfect.

It is said in Mr. W. H. H. Russell's articles that Justinian "long centuries ago, wisely instructed his codifiers to select what was useful, omit what was antiquated or superfluous, avoid unnecessary repetition, get rid of contradictions, and make such other changes as would produce out of the mass of ancient judicial writings, a useful and complete body of laws." Let us stop and contemplate the duty of codifiers under these instructions. It necessarily implies that they shall be equipped with a complete knowledge of all the facts of social life; that they shall know not only what has been useful in the past, but what shall be useful in the future; and that their judgment as to what is useful, antiquated, superfluous or contradictory, is better than men of experience in the affairs of life, acting upon each set of conditions as they arise. They must decide upon what principle they shall proceed, what the foundation upon which the superstructure is to be reared shall be. Shall it be the abolition of private property (socialism)? Or shall the government do all for the individual (paternalism)? Or shall the saying "every man for himself" (*laissez faire*) express the principle? Or shall it be all three, or some two of them? I submit this is expecting too much of human beings; that however great modern lawyers may be, none is capable of complying with these instructions.

It is true a code might be drawn, which, upon paper, would seem to be logical, symmetrical and complete, but when applied to the affairs of life, would certainly be found to be inadequate and inefficient. For evidence of this, let us examine the California codes, which Mr. W. H. H. Russell says are "perfect."

In a late number of *The Pacific Reporter*, of nine decisions of the Supreme Court of California printed together, five were decided without reference to the codes, upon the authority of decisions of other courts and the *dicta* of legal text books. This absolutely demonstrates the fact that these codes, however well they may read, are not adequate to cover the cases as they arise; because, if they were, authority would be found in them for every case, and no necessity for the laborious examination of authorities would exist.

Mr. W. H. H. Russell and Mr. Sutton both cite the Justinian code and the Code Napoleon, and Mr. Russell also cites the action of the Austrian Empire in codifying its law; and they would have us infer from the fact that the Romans, Austrians and French have had or have now, codes of law, that we should also

codify our laws. These different codes were enacted by governments which were arbitrary in their nature and in which the people had little if any voice. The practical difficulties in the way of codification in a republic are vastly greater than in a government where the power is in the hands of one man like Justinian or Napoleon. Further than this we have not been in the habit in this country or in England of going to countries governed arbitrarily, for precedents. And it is respectfully submitted, that for obvious reasons, such precedents can have and ought to have very little force with us. As to California, it is at least an open question whether it was not suffering from arbitrary government at the time of the adoption of its code.

One object of codification as stated by Mr. Sutton is to so simplify the law that every individual may know what it is and be able to intelligently obey it. This would certainly be convenient, and it would also be convenient if we all understood the laws of chemistry, and were thereby enabled to dispense with chemists; but the one is as impractical as the other. Both propositions are in conflict with that law of progress which makes division of labor necessary to advancement. The lawyer, a trained specialist, is just as necessary in society as is the physician, the merchant or the farmer. This proposition to codify the laws of society, by legal enactment, is of the same nature as would be a proposition to have each individual codify the laws of his body and mind and resolve that his organism should be governed by the code. No one would pretend that such a course would be safe or practical. It will be seen at once that in such a case the code would be efficient only where it conformed to the actual law and that his organism would refuse to be governed by such parts of the code as proved to be in conflict with the real law of his being. Or if the individual should endeavor to compel his organism to conform to his code, the result would be disease and death.

To sum up the argument: There is no mysterious, magical or supernatural power or wisdom in legislative enactments. The law is made up of customs and practices of the people, and it necessarily is as infinite in its variety as the intricacies of social life. No man or set of men can obtain such a grasp of the facts, circumstances and surroundings of social life as to enable him or them to state in proper classification what the present law is, or what it shall be in the future. A classification is however being carried on under *stimuli* of the same kind that prompt men to

activity in other departments of life, and which have been found by experience to produce the best results. That therefore any attempts to officially codify the law, except those general principles found in the ten commandments and in our constitutions and the like, about which there can be no question, are unwise and sure to result in failure.

But it does not follow that because a code will not simplify the law and make it more certain, that there is nothing to be done in the way of reform. If statesmen, legislators, judges and lawyers would cease to ask what is the best form of constitution for a state and begin to inquire what *is* the constitution of a state instead; if instead of reliance upon *a priori* reasoning, with eyes closed to the facts of life, they would seek for the soul of the law; would endeavor to find out what the law is, and must be in the nature of things; and then, having discovered the law, would adopt its reasoning instead of their own, many apparent conflicts, inconsistencies and absurdities, would disappear. If instead of attempting the impossible task of creating the law, their minds should be directed toward the discovery of it, and the removal of obstacles to its free operation, much of the injustice which now results from the acts of legislatures and the decisions of courts would disappear. If a great body of law now classed under the head of "private wrongs" should be classified as "public wrongs" instead; for instance, if a man by fraud steals my farm, the offence should be classed with other offences which are of precisely similar nature, but differing in the immaterial fact that, for instance, it is a theft of my horse by force, instead of my farm by fraud; and if instead of requiring me to spend in tedious litigation the value of my farm in endeavoring (often fruitlessly) to recover it, the offender should be punished, and my farm restored to me, at the expense of the state "with all convenient speed," "a great right" would be accomplished.

If the bar and legislature would recognize some of the commonest facts of life, viz: that judges upon the bench are but human, and are influenced by the same considerations that affect all other human beings, and that therefore they must of necessity, and do as a matter of fact, contemplate with dread each recurring period when their official term expires; and that they must of necessity and do as a matter of fact, take such steps as to them seem likely to do the most good in insuring their continuance in office; and that these steps, in the nature of things, must more or

less distract their attention from their duties; and that their anxiety for their bread and butter must in the nature of things, and does as a matter of fact, consciously or unconsciously influence their judgment in cases before them; and thus the power of nice discrimination, the ability to see all the bearings and surroundings of the case in their true proportion are more or less injuriously affected. If these common facts known to every one, were recognized, it would at once appear clearly that the constitution of the state as it truly is, is so framed that every possible temptation of private interest and every disquieting consideration is removed as far as possible from the judicial mind. That a bench thus guarded and protected would have greater inclination, better opportunity, and ampler time to seek for the soul of the law, which is justice; and in basing their decisions upon this everlasting principle instead of temporary expediency, would go far toward making a people happy, contented and prosperous.

If when a physician is called to the bedside of a sick man, his duties should be limited to recommendations as to treatment and remedies, and the sick man's neighbors should assume to listen to such recommendations and reject them, in whole or in part, as they should be pleased to consider them in the light (?) of their ignorance, prejudices and superstitions, and the treatment actually adopted should be applied by their untrained hands, without the supervision of the physician or any one else qualified to act in the premises, it would be apparent to the most childlike mind that the chances of the sick man's recovery were exceedingly small, and such practices would have no defenders. But if instead of "physician" you read "trained judge on the bench," and instead of a "sick man" you read "a question of right and wrong," and instead of "neighbors" you read "a jury of the vicinage," you have a system and a practice that is upheld by a large proportion of the people and is glorified in as one of the bulwarks of our liberties. And as there would be no basis for the assumption that the sick man's neighbors were more honest than the physician, so there is no basis for the assumption that the liberties of the people are safer in the hands of an untrained jury, (very often of less than average intelligence), than in the hands of a trained judge amenable to public opinion.

Grand Rapids, Mich.

*DISSATISFACTION WITH THE SENATE.**

ALFRED RUSSELL.

There has been, of late, a disposition to speak with some disrespect of the senate of the United States. It is decried as an obstruction to legislation, and a menace to our institutions. It is derided as an American House of Lords. It is denounced as undemocratic, because it is not the outcome of direct popular election, and because of the six years tenure. It is assailed on account of the gross inequalities which exist with regard to the size, population, wealth and power of the constituencies which are represented in it. It is stigmatized as a club of rich men who gain their places by manipulating state legislatures. Its past history is pointed to and it is alleged that it has declined in the character and eminence of the men who are disposed to enter it, or who succeed in obtaining seats in it. Some newspapers and some public speakers go so far as to demand its abolition.

Let us inquire briefly into the composition of the senate, as a part of our constitutional system, and let us see whether these various severe strictures are well founded, and if so whether it is possible to make any changes for the better. It is true that in one sense the senate is an obstruction to legislation. That is one reason of its existence. It was created partly for the very purpose of counterbalancing hasty, improvident and reckless action by the house of representatives. Two chambers, resting on different bases, and of a different composition, have been thought necessary in most modern governments. If one chamber does not operate, to some extent, as an obstruction to the action of the other, there is no utility in having two; nor is there much utility if one is a mere duplication of the other, as with most of our state senates. In some of the states and in the neighboring province of Ontario, there is but one chamber. It must however be admitted that the senate of the United States is more of an obstruction than it should be for the reason that it does not govern itself by means of a rule of closure. The silver debate of 1893 has demonstrated

*A paper read before the Michigan Political Science Association, at Detroit, Oct 20, 1893.

this, and there can be, and should be a change. But this change can come only from the senate itself, under the pressure of public opinion which is the real ruler of this country. The previous question is the common law of all parliamentary bodies. No rule of the senate has either recognized or abolished it. Forcing an agreement to come to a vote by physical coercion is equal to the barbarism of coercing a jury by confinement, and is totally unworthy of a civilized country. But such is the absurd practice of the senate.

There is no resemblance whatever between the senate and the House of Lords, except that each is a second chamber. One is a representative body elected by independent states, and its members sit for a term of years; the other is hereditary or appointive. One is not based in any degree on property or social rank; the other is wholly so. One is clothed with important executive functions in respect to making treaties and confirming nominations; the other possesses no such functions. One rests upon an unchangeable provision of a written constitution; the other rests nominally upon custom and precedent, but in reality upon the pleasure of the English commons, who abolished it once, at the time of the republic of England, and may perhaps again. In fine, the House of Lords is the exponent of the spirit of caste, in which Englishmen believe thoroughly; but the senate symbolizes the equality of states founded upon the equality of citizens.

So far as it is objected that the senate is not, as at present constituted, the fruit of immediate popular election, it is to be said that it rests with the legislatures of the several states whether or not to create senators in that way. The state legislatures appoint the senators, under the constitution, and such appointment may be made by the legislature itself directly, which is the usual course; or, by popular vote in districts, or, by general ticket, according as the legislatures may provide. This was so adjudged recently in the Michigan case of *McPherson v. Blacker*.¹ Here again public opinion will govern. Michigan recently adopted the method of popular vote in districts, but has returned to the method of direct appointment by the legislature. The limits of this paper do not admit of a discussion of the merits of the respective methods. But the fact that in all the states except eight, all judges are elected by popular vote, seems to show

¹146 U. S., 1.

the existence of a drift of opinion which will ultimately lead to the election of senators by popular vote; and I am in favor of that method. It is true that the founders of the government intended that the senate should not respond quickly and readily to popular sentiment; and that it should differ in this respect from the house, and should serve as a stable and steadying force in our system. Nevertheless, inasmuch as one-third of the senate is elected every second year, the senate has proved sensitive to public opinion which always has controlled it and inevitably always will control it. But direct popular election would at the present time, make the senate stronger with the people, more influential, more respected and more worthy of respect. Popular election would bring out men who could conduct an educational debate before the people, resembling the memorable senatorial canvass of Lincoln and Douglas, in Illinois, in 1858. Under the present practice the legislatures do not actually select a senator, but the candidate for the senate procures the election of members of the legislature with reference to their selecting him as senator.

I pass to the subject of the absence of proportionate numerical representation in the senate. The original state governments were recognized and perpetuated by the constitution and were continued in the possession of the larger part of their antecedent rights of sovereignty. The states surrendered to the new government certain enumerated powers and reserved all the rest, although the new government was made supreme within its sphere over every inch of all the territory of all the states. A house was created proportioned to the numbers of the whole American people, but the senate was based upon the perfect equality of all the states. It was ordained, as a fundamental part of the constitution, that each state should be entitled to two senators, because it was found necessary that the new government should have not only a national character but also a federal character. The small states absolutely refused to become members of a union based upon numerical representation alone. They insisted that each state, as a sovereign and independent political organization, no matter how insignificant in territorial extent, numbers and property, should stand in the senate on an equal footing with every other state, no matter how important in size, population or wealth. The senate was to be, and is, in some sense, a council of ambassadors from the states. In this aspect of it, the senate was not the result of theorizing about the creation of a second cham-

ber, but was produced by the necessity of the case. The senate was neither invented nor copied. It grew. Great as is the apparent anomaly that Rhode Island should counterbalance New York, and that Delaware should counterbalance Pennsylvania, this anomaly was absolutely unavoidable. The alternative was the failure of any plan of union whatever. The unfortunate thing has been that this anomaly has been repeated and increased without necessity, and from partisan motives. Territory acquired, in pursuance of our historic policy, under the war-making and treaty-making powers of congress, has been erected into new states grossly unequal in all that goes to constitute such political communities. Regions containing not one-third of the population requisite for a single representative, have been admitted as states, entitled to two senators. It is unfortunate that six so-called "silver states" should have been admitted, having only eight representatives but having twelve senators, who counterbalance the twelve New England senators, and outweigh the ten senators from the states of the original northwest containing a single city, Chicago, with a greater population than all the six silver states put together. But the mischief is done and is absolutely without remedy. A state may dwindle, as Nevada is rapidly dwindling, until it may approximate the condition of the English so-called "rotten boroughs" of which Lord John Russell said, in 1832: "You look upon a mound, or a deserted house, and are told it sends two members to parliament." A constitutional amendment would be powerless to deprive a state of statehood, and of its two senators, without its consent. So article V of the constitution expressly ordains. A state can neither perish nor be degraded. Once a state, always a state. Chief Justice Chase said in *Texas v. White*:² "The constitution in all its provisions looks to an indestructible union of indestructible states." The senate is therefore, itself indestructible, and is the most stable and unalterable political body in the world! It will exist long after the House of Lords has passed away. Those who talk of the abolition of the senate do not consider what they say. The abolition of the senate would mean the destruction of the Union. See the language of Chief Justice Marshall in *Cohens v. Virginia*.³ There is no remedy whatever for the inequality complained of,

² 7 Wall, 725.

³ 6 Wheaton, 380, 390.

except to admit no more skeleton states. The existing territories should remain territories.

I have already said that I believe popular election the best method for the states to employ in the making of senators, with reference to the cure of the evil of obstruction to legislation. This method is also desirable as a remedy for the two remaining evils we have to consider, namely, the presence of many millionaires in the senate, and the decline of that body in the character and eminence of its members. These evils have, however, been greatly exaggerated. Not one-fifth of the senators are men of great wealth, nor men chargeable with having used their money to buy legislatures. The remainder are, in general, lawyers of standing, possessing only a competence. It is not desirable that the senate should be composed wholly of lawyers, though it is plain that good lawyers have special qualifications incident to their calling for usefulness there. The men of renown there, in the past, have generally been lawyers. The membership of men of business and affairs adds much to the value of that body. But merit and talent shown in any department of the world's work may and can give a man enough consideration among his fellows to gain for him a seat in the senate and render him useful when there. There are enough men qualified for the senate in every state to render it unnecessary to fall back upon rich men having no other recommendation than riches. No doubt the pecuniary expense attending the residence of a senator at the capital has largely increased at the present time, and this fact takes men of wealth there and deters others from looking thither. Washington is no longer what it was when the wife of President Adams hung the clothes to dry in the east room; or when senators messed together; or when feminine authority had not shown itself there. The conditions of living there, so far as expense, luxury and display are concerned, are simply duplications of what we see in all our cities. We cannot expect plain living and high thinking at the centre, if not found throughout the country. Washington simply reflects the constituencies. Republican simplicity in high places has disappeared forever from this nation which has now become the richest and most powerful in the world. It results, I think, that these altered circumstances render two changes desirable in order to improve the membership of the senate and to enable men of mark, possessing only moderate means, to consider entering it, and to enable the states to have the benefit of the services of such

men. The compensation of senators should be increased and they should be provided with official residences of uniform cost. There is no equality of states when a senator from one state is able to live in a hundred thousand dollar house and turn over his salary to a secretary, while a senator from another state is forced to live in humble lodgings and do the work of a clerk. The official life of a senator is a third longer than that of a president who is provided with a house. There is a bare possibility that the representatives might consent to these changes. Representatives often become senators.

I submit in conclusion, that the grounds of dissatisfaction with the senate are slight compared with its utility as the most remarkable political contrivance in modern government, and by the side of its great and splendid history. A hundred years have shown that it is indeed the masterpiece of the constitution. It stands four-square to all the winds that blow. May it be perpetual because upon its perpetuity depends the perpetuity of the Union.

Detroit, Mich.

THE NEED OF A HIGHER STANDARD OF QUALIFICATION FOR ADMISSION TO THE BAR.

WILLIAM K. CLUTE.

Every person who engages in the profession of law in this state is presumed to have taken the obligation of supporting our state and national constitutions and to faithfully discharge the duties of attorney, solicitor and counsellor in all Michigan courts. When duly admitted to the bar, he becomes an officer of the court. His chief function is *to assist the court* in the administration of our laws. As such officer he should exercise his best powers in carrying out, more especially, the second object mentioned in the preamble of our national constitution, to "establish justice" in fixing the practical relations of man to man in civil society. He should encourage the rule of reason and right to govern men's actions whereby its power may be rendered so subtle and all-pervading in its effects that the operation of our laws may seem to take place as the result of spontaneous conditions and circumstances. To enable him to perform his duties to the court first, and to his client second, according to this standard, and I think it is the true one, he should possess a moral perception and character that will discern out of a mass of facts the natural justice of a cause, and the courage to announce the results of unbiased judgment upon them. He should possess, also, a thorough training in the science of jurisprudence. His duties require him to pry into the secret recesses of the human heart, to discover the motives of men from their language and conduct. It is for him, also, to discover the effects of abstract reason and law on such words and actions. But his relations are not wholly with the courts. He is an important factor among the people as a confidential adviser of corporations, municipal and private, business and mercantile men generally, farmers and laborers. In fact, people of all classes come to him with their domestic difficulties, personal and property interests, usually intricate or in a confused state, asking for guidance according to law in unravelling their affairs and being restored to their proper relations between each other. Not only

is he an important factor in the private recesses of the council-room, but he also occupies a relation to our state of a public nature. Our judges of the supreme and circuit courts are required to be lawyers. They are placed in these positions by selection of their fellow men to make authoritative announcements of what the law is, chosen for their excellence of judgment and skill in discerning the right of a cause under the law, from an intelligent and refined standpoint.

The legal profession should also take an important part in making laws for our state. That a good knowledge of law is of great value to a law-maker is demonstrated by the seeming lack of it in passing many of the unconstitutional, not to say harmful and defective laws now on our statute books. We sometimes hear their presence in our legislatures deprecated. But is it not amazing that there is scarcely "no other occupation in life, or art or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical; a long course of reading and study must form the divine, the physician and the professor of laws; but every man of superior fortune thinks himself born a legislator!" These are the sentiments of Blackstone uttered over one hundred years ago, and time has only demonstrated the truth of what he said, over and over again.

I have, thus far, attempted to chalk out briefly the field properly embraced within the legal profession. Its practice as a daily vocation is both a science and an art. It is a science, in so far as the greatest powers of the mind are applied in developing the general principles of jurisprudence from the great field of human action and conduct. As a science, the lawyer takes the facts from the history of mankind for ages, and combines the principles of original justice into a comparatively few rules and maxims which are to govern all human concerns. It is the study of mankind. The practice of the law becomes an art, when the lawyer seeks to apply these principles to new facts and circumstances, and to bend the course of human conduct by these rules into channels of thought and deed which will carry out this natural justice in the future relations of human beings to each other.

To perform his duties well he should have a fair knowledge of the law he is to administer, or the history of its fundamental principles and maxims, causes and effects, and also of the organic

law of the state and nation in which he lives. It is, however, sometimes said by those not in the profession of law that a man with *common sense* is endowed with all that is necessary to apply the rules of law to human conduct. But it is to be observed that those persons have a strong predilection in favor of *common sense* when applied to those professions in which they are not familiar with its system or rules. A sailor, for instance, would want his disease treated by a doctor who used only *common sense*, but he would scoff at the idea of guiding a ship by *common sense* without regard to his map and compass. Neither would an architect nor a musician neglect those systems of rules which in their respective arts have been discovered by scientific investigation and aided by experience. So it is, that each person gives preference to unassisted *common sense* only in those cases where he himself has nothing to trust to, and invariably resorts to the rules of art whenever he possesses the knowledge of them.

Therefore, I insist that it is important and essential that every person who seeks admission to the bar of Michigan, should possess a sufficient knowledge of the fundamental principles of our system of laws that will enable him, with a little time, and such skill as he may acquire by practice, to grow in ability and strength with each succeeding effort, and be able to master the law of the cases that come to him, instead of sinking the interests intrusted to his care into greater depths of confusion. There are many able, upright, skillful, conscientious attorneys in our state, possessed of deep learning and capable of exhaustive research into the causes in hand. To them all honor is due. It is also a fact, deprecated on every hand, that the door open to new accretions to the bar of our state is ajar too far, and that some means should be devised, if possible, to lessen the evils now existing. And to do this, it seems to me that we should consider: 1st, The present law; 2nd, the mischief; 3rd, if possible, suggest the remedy.

The Present Law.—Chapter 253 of Howell's Statutes provides that the supreme and circuit courts may grant to such applicants for admission to the bar as are approved for their good moral character, licenses to practice as attorneys and solicitors, upon showing by an examination in open court that they possess sufficient legal learning and ability to discharge the duties of such office. Supreme court rule 55 provides that any person duly licensed to practice in any circuit may, upon application to the supreme court clerk, sign the roll of attorneys and thus be

entitled to practice in the supreme court. Admission, therefore, either in a circuit or the supreme court is practically admission to all the state courts. Rule 1 of the circuit courts provides that the requisite legal learning shall embrace a knowledge of the principles of common law and practice generally, as well at law as in equity. The good moral character of the applicant must be vouched for by at least one reputable member of the bar, or some other reputable person known to the court, in a manner satisfactory to the court.

The practice under the law and rules is that upon the petition being filed, the court to which it is presented appoints a committee from among the attorneys present, which examines the applicant as to his legal attainments, and reports the result of it, either by recommending the applicant for admission if they think him qualified, or deferring the report for a time if they think further study necessary. Thus stands the law at present, in governing admission to the bar. That this system has many disadvantages and is liable to many abuses is too well known to every judge and attorney in the state to require more than a bare statement of it to have its truth admitted. To enumerate some of

2. *The mischiefs.*—I will mention first, the entire lack of uniformity in the examining committees. Scarcely six applicants come before the same committee throughout the entire state. In circuit courts, the applicant is usually well acquainted and on friendly terms with the members of its bar. It is quite often the case that he is a relative of some member of the bar. The attorney in whose office he has read law will also likely be on hand, as a chaperon. The social or political standing of his parents may not be without influence. He makes his application surrounded by his friends, examined by his friends and recommended by his friends, often with little regard to his legal attainments, but more with a desire not to hurt his feelings or discourage him, or incur the displeasure of those watching his young career. With friendly regard for the welfare of every law student, I must say, and think all will agree with me, that this does not benefit the applicant, or his future, as a lawyer. I consider it greater credit to him personally to work his passage, so far as its effect on the public is concerned. Their interests do not demand that they should swaddle, rock and dandle every applicant into a lawyer. At every step of his progress, at the threshold and afterwards, let him show his passport and prove his title by proof that he is not

wholly unacquainted with our laws and the system of government under which we live. This course will make better lawyers, better men, and bring its reward in certain and well known ways which are germane to the administration of justice in our state.

The first mischief gives rise to the second, namely, the unequal standard of legal ability and learning required of the applicant. No two committees would cover the same general ground in quizzing candidates. Some examinations would be unduly severe, others too lax, others outside of proper lines of thought. Again, lack of any preparation by the examining committee is likewise apt to result in shallow questions upon side issues that have little or nothing to do with the deep laid principles of the common law, a knowledge of which should be the test of legal qualification. Then fourth, there is the indefinite course of study prescribed for the applicant. "He shall possess a good knowledge of the common law and practice, at law and in chancery." Where shall he begin, and when shall he deem himself sufficiently qualified to pass an examination with this course of study prescribed for him? He is left to roam through the fields of English and American history and common law, wherever his fancy may lead him. He is pointed to Blackstone, Kent, Story, Chitty, Coke, Greenleaf, Parsons, *et al.*, and then told to sit at their feet and learn wisdom. Unless his course of reading is well directed at first by some competent person interested in his welfare, the law will become, as it often continues to be, at best, a dry and revolting study. To those who love it, it is hard and laborious; it is a dark and intricate labyrinth through which all office students must grope in constant uncertainty and perplexity, the most painful of all states of mind, and not unlike our nation's financial state of mind to-day. He must dig and tug and sweat at the roots of the law to find out what he can, and be thankful for small favors. He must walk, as it were, through the valley of the shadow of death, and be content to emerge into the bright and perfect day only after years of patient labor. It must be years of waiting and working before he can see at a glance the whole system, and walk, like a master of a mansion, at his ease, into any apartment that he chooses. But difficulties attending the law student as to the plan of study are obviated by a course at our university. All cannot go there, however; hence, would it not be well that there should be some general plan mapped out, that all may work to, and feel that they are at least on the right track?

It also happens, occasionally, that an applicant denied admission in one circuit will go to another one, or to the supreme court and slip through, without knowledge of the previous application and rejection by the court that admits him.

These, while not all of the mischiefs now at work in our state of the nature spoken of, have been sufficient to call forth unfavorable comments from many quarters, and none less than by the judges of our courts, though not in any formal, public way.

3. *The remedy.*—At our last session of the legislature a bill was introduced that had in view the subject now in hand, but it did not pass either house. That a bill of a similar nature introduced at the next legislature will meet a similar fate remains to be seen. It will not, I believe, if the matter is squarely and properly placed before that body, as no doubt was done at the last legislature, but for some reason not important here, it was passed by.

Will it not, then, be one of the practical things the Michigan State Bar Association can do in its future work to agree upon some bill on this subject, and make a united, strong request of each house that it be passed? In that bill there should be a provision for a single board of examiners for all applicants in this state, with compensation for actual service and expenses. A general outline of what will be expected as a test of legal attainments, the usual qualifications as to age, citizenship and moral character should, of course, under proper safeguards, be preserved.

At least two, if not three years previous study of the law should be required, one of which has been in the office of some reputable attorney. There are other minor matters connected with it which are mentioned in the report of a committee on legal education and admission to the bar on page 230, Vol II, of THE MICHIGAN LAW JOURNAL. The main thing is to get a uniform, reasonable, thorough standard for all, and then see that the law provides means to have applicants come up to it, before they are given the credit a license to practice entitles them to. This plan, it seems to me, will increase the efficiency and character of the Michigan bar, along lines of conservatism and usefulness to the people of the state. It will do no harm. It will do much good.

The advice of United States Attorney General William Wirt to a law student contains in it much truth that might with wisdom be heeded. He said: "In the first place, you must read, sir, you

must read and meditate, like a Conestoga horse,—no disparagement to the horse by the simile. You must read like Jefferson and speak like Henry. . . . You are to remember that glory is not that easy kind of inheritance which the law will cast upon you, without any effort of your own; but that you are to work for it and fight for it, with the patient perseverance of a Hercules. You are also to bear in mind, that the friends who know and love you and acknowledge your talents, are not the world. That in regard to the world upon which you are entering you are unknown; that with them you have to make your way as a perfect stranger."

In conclusion, let me say, that the effect of raising our standard will have a tendency to encourage industry and merit in the pursuit of law as a profession, and will be a discouragement to all who wish to attain to its true rewards by the easy ways and short cuts too often unsuccessfully followed.

Ionia, Mich.

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NOTES.

LEVI T. GRIFFIN, Fletcher professor of law at the University of Michigan, and who has been a lecturer there longer than any of the present faculty, has been elected to congress by the Democratic party, to succeed the Hon. J. Logan Chipman, deceased. The resolutions unanimously adopted by the students of the law department express the feelings of every one who ever listened to the lectures delivered by Prof. Griffin. A kinder, more considerate gentleman has never occupied a chair in a university than Levi T. Griffin; not does his interest in the law student cease after the student has left college, but he is ever willing to assist, and to lend the young lawyer a helping hand. We have studiously avoided taking sides on political issues, otherwise we might enlarge upon Mr. Griffin's particular fitness for a position in congress. As it is, we will content ourselves with saying that he is a gentlemanly scholar in every sense of the term, and one for whom the editors of this journal, in common with all alumni of the law department of the university, entertain the highest regard.

THE World's Fair will be the indirect cause of considerable litigation. One of the most novel suits for which it is thus accountable is about to be commenced in Chicago. Several of the hotels, erected about Jackson park and other parts of the city by syndicates of capitalists who thought to reap a harvest from the crowds they expected to entertain, have not proved to be the financial success anticipated. During a great portion of the time

the expected guests failed to arrive. The hotel owners think that certain railroads are responsible for it. They claim that the railroads in the western states passenger association that opposed the reduction of passenger rates to the World's Fair are liable for losses by the hotels and other places of entertainment by reason of the customers being kept away from Chicago by the high rates. In other words, that these roads are liable for the difference between what the profits to the hotel owners, etc., were when there were low rates, and what they were when the rates were held up. It is claimed that the right to recover damages extends not only to those who built hotels and other places of accommodation near the grounds, but also to all persons in or near Chicago who were prepared to entertain in any way the visitors to the fair. One of the strong arguments used by counsel for the claimants is, that the conduct of members of the World's Fair transportation committee and a representative of the railroad association was collusive in its character, and amounted to conspiracy in law, but not in fact, to prevent the reduction of passenger rates to which the public, and persons making investments for the accommodation of visitors, were entitled.

MR. W. W. HYDE of Grand Rapids, in his article "Can the Common Law be Codified?" says: "Without pretending to speak with any special knowledge, yet as far as I am informed, past efforts in codification have been failures." This statement is not only contradicted by the experience of two-thirds of the American states, but on its face the writer of the statement does not "pretend to speak with any special knowledge." Nor do advocates of the code look for anything magical in legislative bodies, yet they have a vast function to perform. Legislatures have abolished wager of bittle, and most of the barbarous incidents of feudal tenure, which, but for legislatures, would still adhere to the body of laws. A great part of the work of every legislature is to correct the common law, and better adapt it to a modern transplanted civilization. These statutes would be better were they systematized. No one disputes that. It would also be better, by the same reasoning, to re-enact the old law, with the amendments, instead of allowing the rule, which is variously amended by separate enactments, to moulder in voluminous reports. The Linnæan system in botany was not cited by Mr. Sutton, in his article, as a perfect classification, but it was vastly superior to the uncoded system which prevailed before. To be better than the common law system the code need not be perfect.

It is always the boast of common law lawyers that theirs is the system of evolution. So the moralists said about slavery; that evolution would give the slave his liberty. Evolution might simplify the law, but we have not time to waste upon it. Sometimes revolution is a short cut to a desired end. Law, hampered

by the restraints of antiquity, cannot grow naturally, and hence some assistance must needs be rendered by legislation.

Mr. Hyde has chosen his subject unfortunately, for the question, "Can the Common Law be Codified?" is practically answered by the fact that the common law has been codified, not only substantially so in England, but in two-thirds of the United States.

A CURIOUS legal complication has arisen in the city of Detroit, one which the supreme court has been called upon to explain.

On the 15th day of July, 1893, the mayor of the city of Detroit appointed John J. Speed, city counsellor. The appointment was in writing, which was filed with the city clerk and reported to the common council, but no action was taken relative to such appointment by that body. One of the acts passed by the last legislature was entitled an act "supplemental to the charter of the city of Detroit, and to provide a law department in said city," and section 2 provides: "The city counsellor . . . shall be appointed by the mayor on or before the third Tuesday in June, for a term of three years." Section 3 provides: "The city counsellor . . . shall before entering upon the duties of his office, execute bonds to the city of Detroit in the sum of \$5,000, and such sureties as the common council shall approve." At the time this law went into effect, the charter of the city of Detroit required that all "nominations by the mayor shall be made to and confirmed by the common council."

On 25th day of July, 1893, the mayor notified the common council that the appointment of Judge Speed, made on the 15th day of the same month, and which had not been acted upon by that body, had been revoked, and on the 9th of July duly appointed John B. Corliss, which appointment was confirmed by the common council, and at the next session his official bond was approved. Judge Speed, disputing the authority of the mayor to revoke his appointment, claiming that the appointment was complete, applied to the supreme court for a mandamus to compel the council to approve his official bond. The council maintained that the appointment was incomplete: (1), In that the new law did not abolish the confirming power of the council, that it was simply amendatory and supplemental thereto; (2), because the bond of Judge Speed had not been approved. However, Judge Speed held possession of all the city's papers, while the mayor and various city departments, recognized Mr. Corliss as city counselor. Extended litigation seemed certain, and the council finally undertook to adopt summary proceedings in the matter. Section 10 of the city charter reads: "Any officer, holding office by appointment, unless otherwise provided by law or ordinance, may be removed at any time by the common council, without charges, and a trial thereof, by a vote of a majority of the members elect." Under this section

Judge Speed was removed without charges, which action he maintains is of no effect in that his appointment was under a special law, and as the section quoted refers only to officers appointed by the council itself.

In granting the application for mandamus the supreme court passed upon all the essential points of the controversy, holding in every instance according to Judge Speed's theory. His appointment was therefore complete, and his position is, as it should be, secure from arbitrary interference by any one.

It is a good sign when the lay press—the newspapers—begin to discuss questions of law reform. The agitation in favor of codification begun by this journal is bearing fruit in the interest that the newspapers of the state are manifesting. It means that the people, without the pale of the profession, are beginning to enquire what this new scheme, for rendering litigation more speedy and justice more certain, may be. The *Grand Rapids Herald* has more than once expressed itself in favor of the reform. The following is one of its most recent utterances :

“That Michigan will sooner or later emulate the example of the more progressive states of the union and adopt a code of civil procedure seems to be practically agreed upon by the younger members of the bar and almost all the acting judges of the circuit courts? The MICHIGAN LAW JOURNAL, one of the most carefully edited periodicals in the country, has devoted much space to an impartial discussion of the subject, both the negative and affirmative sides of the proposition having been treated by learned writers. This discussion has unquestionably quickened general interest in the subject among lawyers and so far awakened the circuit judges to the advisability of a change that a meeting has been called for to-morrow evening at the court house in this city, when and where the subject will be carefully considered, and it is probable some definite action will be taken. The opposition to a code of procedure comes entirely from old lawyers, who imagine that such an innovation would nullify the learning and experience of years. Nothing could be farther from the truth. Codification is but another name for simplification. The crude and cumbersome practice of the common law is transformed by codification into the simplest forms of procedure to arrive at the same end. The interminable common law pleadings loaded with redundant and many times grotesquely absurd counts or allegations under a code become plain statements of facts and denials. The practice under the code comprehends all the knowledge of the common law in the briefest compass. The old practitioner becomes a skillful code pleader and a successful code practitioner, where a young man who is compelled to go back to first principles utterly fails to

make a record. The code is the old lawyer's salvation, the young man's hope. It is not yet absolutely perfect, but its imperfections are virtues compared with the faults of the practice that has obtained since Justinian issued his pandects."

JUDGING from an open letter to Dr. Henry Wade Rogers from Judge Henry Booth, published in the *Chicago Legal News* of October 28, the dissension in the faculty of the law department of Northwestern University has broken out anew. Judge Booth has resigned from the law faculty, apparently for the same reason that impelled Prof. Marshall D. Ewell to sever his connection with the same institution and establish the Kent Law School. The open letter to Dr. Rogers from Judge Booth is an exceedingly caustic one. If its statements be true, Judge Booth's resignation has been forced from him by reducing his salary one-half and doubling his work. Dr. Rogers has incurred the open hostility of more than one of the professors of Northwestern's law school by re-organizing the school and re-shaping its policy without consulting those who have been associated in its management since its foundation. Judge Booth had been connected with the school for thirty-four years, and naturally resented the treatment to which he was subjected. A portion of his letter is as follows:

"A little attention to the lessons of experience, which the old faculty would gladly have imparted, would have saved you from more than one costly blunder and mortifying failure. But for such blunders the attendance during the last two years would have been not less than two hundred and fifty students, and your treasury would have been replenished by the reception of tuition fees, instead of showing a deficit of several thousand dollars. There would have been no occasion for pleading inability to meet your moral obligations through poverty. You alienated your best friend, who had done more to secure for you the position you now hold, than any other man living. By your unjust and selfish treatment in ejecting him from his professorship, conduct involving ingratitude of the deepest dye, you gave him provocation and opportunity for starting a rival school, thereby diverting from the Northwestern a large and increasing proportion of the clientage, which, as the successor of the Union College of Law, it would naturally have enjoyed, except for being repelled by your most ill advised measures. Nor can you plead in extenuation of this greatest of all your blunders, to call it by no worse name, the want of friendly caution—as you well know."

It is to be regretted that Dr. Rogers and the trustees of Northwestern University could not have prosecuted their plans for re-organizing their law department without stirring up so much bitter feeling. It certainly seems as though a little more diplomacy could have been exercised.

THE last annual meeting of The Michigan State Bar Association seems to have attracted the attention of the profession in England as well as in this country. Unlike the proceedings of any other state bar association, those of our association are published in full in a legal publication, the MICHIGAN LAW JOURNAL, and are therefore given a wide circulation. The papers read at the annual meeting of 1893 have been re-printed in law journals throughout the country and in England, and have provoked discussion in the lay press as well. The result has been that our state association has acquired a reputation as one of the most active in the country. The new constitution of The Michigan State Bar Association has been the subject of some comment and the *London Law Journal* recently published it as a "model constitution for bar associations." There is undoubtedly a renewed interest among the legal profession in bar associations, and the new appreciation of the need of law reform is resulting in a revivifying of the old associations of lawyers which, in nearly every state, had become defunct. The activity of The Michigan State Bar Association is not nearly so great as our contemporaries evidently believe. The interest in its work has been confined to a limited few of the ablest lawyers in the state, but there has been an evident growth of interest in the association and its objects, since the organization effected at the last annual meeting.

The projected meeting of circuit judges on December 27 has had a quickening effect among lawyers. It is an encouraging sign. The circuit judges of Ohio have a regularly organized association, and meet once a year to discuss reforms needed in their own sphere, as well as plans for bettering the condition of the entire profession. There can be no doubt as to the success of the movement in this state if a sufficient number of the circuit judges can be induced to attend the first meeting and acquire a little of the spirit of enthusiasm of the promoters. There are many problems for the judges to discuss, and it is difficult to estimate the amount of good, of benefit to the profession, to the law, and especially to the administration of justice, that would arise from such meetings if properly conducted and directed. The meeting will be held at Lansing on December 27, and we understand that it is open to practicing lawyers, as well as to the lawyers who are now upon the bench.

EDWIN F. CONELY has resigned his position as professor of law at the University of Michigan. He was regarded as one of the strongest legal lectures in the university, and the faculty, regents and students all regret his resignation. He was forced to resign on account of the immense amount of legal business he transacts. Mr Conely probably tries more cases in the courts of this state than any other practicing lawyer. The regents have added the names of Alexis C Angell and Otto Kirchner to the

law faculty. Both of these gentlemen have lectured at the university, so the regents did nothing experimental in selecting them.

Mr. Angell was born April 26th, 1857. He took an A. B. degree from the University of Michigan in 1878, and LL. B. in 1880. In 1879 he was admitted to the Wayne county bar, where he has since been a constant practitioner. Mr. Angell first read law with Walker & Kent, but has been associated with Ashley Pond, and William H. Wells since 1882. At the present time he is a member of the firm of Wells, Angell, Boynton & McMillian. During his residence in Ann Arbor, Mr. Angell became acquainted with Judge Cooley's daughter, whom he married in 1880. In 1888 he edited Cooley on Torts, and two years later Cooley's Constitutional Limitations. Though a young man he is regarded as one of the best attorneys in Detroit.

Otto Kirchner was born at Frankfort-on-the-Oder, Prussia, July 13th, 1846. He commenced his legal studies at Toronto, Canada. During the session of the legislature, in 1865, he served as secretary of the house judiciary committee. In 1866 he was admitted to practice before the state and federal courts. Mr. Kirchner was elected attorney general in 1876, and served two terms. He acted temporarily as Kent professor of law in 1866, and upon the death of Prof. Wells he performed his unfinished work. Professor Kirchner will lecture on "private international law," a new subject added to the legal curriculum of the university, and also upon the "marital relations." Of the high grade, hard working lawyers, Mr. Kirchner is typical. He enjoys the work of the lecture room, and consequently is willing to sacrifice much of his business for the good he can do the vast number of young men who will come under his instruction.

Both Mr. Angell and Mr. Kirchner will carry the odor of the court room into the lecture room, and thus temper the often too theoretical atmosphere of the college campus with that which is more practical. The university is to be congratulated upon its acquisition of the services of these gentlemen.

THE HARVARD DEPARTURE AGAIN.—We hardly anticipated that the expression of opinion, in the October number of this journal, upon the reported departure from the established requirements for admission to the law school of Harvard University, would occasion so much comment among our contemporaries. Although we may have been in error as to some of the facts assumed by us upon the authority of others, we do not feel like modifying our conclusions in the least, if we have contributed, in any degree, to arouse the profession to an increased interest in the problems of legal education. In several instances our meaning was misapprehended because of an unfortunate blunder of

the publisher in misplacing paragraphs and destroying the force of the argument.

When it was announced, in more than one legal periodical, that Harvard University, commencing with the collegiate year 1895-96, would raise the qualifications for admission to its law school so that none but students, upon whom have been conferred the degree of A. B. or its equivalent by first-class colleges, could enter the school, we assumed that the report was a correct one, especially as it had been permitted to circulate widely without contradiction or correction from any quarter. We are advised, however, by one of the editors of the *Harvard Law Review* that, "any such announcement is without authority and may be flatly denied. Neither the A. B., nor its equivalent," he says, "will be required for entrance into, or continuance in, the school. The instruction and degrees will continue to be open freely to persons who pass examinations in elementary Latin, elementary French (or other modern language) and Blackstone. Any academic degree of a law school having a two year's course will also be accepted. The only real change is that candidates for the L.L. B., who are not fitted for admission to the senior class of Harvard College and have not a good degree, are required to do a better quality of work while in the school."

Judging from the information contained in the new calendar of Harvard University, this statement is partly correct, but in some respects inaccurate. If it were even approximately correct, the new requirements for admission at Harvard would be substantially the same as those that have prevailed at the University of Michigan for years. But the authorities of Harvard make a somewhat different statement in their calendar announcement. Under the heading "Terms of Admission After the Academic Year 1895-96" (by which it appears that the change will be made beginning with the collegiate year 1896-97, and not 1895-96 as reported) appears the statement: "After the academic year 1895-96, the following persons only will be admitted as candidates for a degree: I. Bachelors of arts of the following colleges: (A list of 105 colleges, in which is included the University of Michigan.) II. Bachelors of Literature of the following colleges: (A list of seven colleges, including the University of Michigan.) III. Bachelors of Philosophy of the following colleges: (A list of twelve colleges, including the University of Michigan.) IV. Bachelors of Science of the following colleges: (A list of seven colleges, in which the University of Michigan is not included.) V. Persons qualified to enter the senior class of Harvard College." At the end of this statement it is noted that these lists of colleges are "not intended to be exhaustive, and will doubtless be enlarged from time to time." It appears, therefore, that the law school of Harvard University, when the new rule takes effect, will be open to regular enrollment, not to those possessing the degree of A. B.

alone, but to those who have earned, by graduation from certain preferred colleges, the degrees of B. L., Ph. B., or B. S. Upon the authority of the official announcement of the school, it can be said, therefore, without doing violence to a fair interpretation of the announcement, that the law school of Harvard University, when the new rule takes effect, will be open only to the regular enrollment of those who, in common parlance, are fortunate enough to be "degree men,"—those who have been blessed with the opportunity to spend four years at certain colleges.

While the privilege of regular admission to the Harvard Law School is not so exclusive as we have been led to believe by the current report, yet after all, without intending any play upon the word, it seems to be but a question of "degree." Instead of being limited to holders of the A. B. degree, it is extended so as to include possessors of the B. L., Ph. B., and B. S. degrees, and we cannot help feeling that this is open to nearly as much criticism as though confined to the single degree of A. B. It is the idea of barring those who are as well equipped, and in many respects better equipped, for the study of the law, from entrance into the school, unless handicapped by extra conditions and requirements for additional work, that is objectionable. Just as at every university and college in the land, students who are unable to measure up to the standard set for regular enrollment at Harvard may take up certain of the work and be classed as "special" students. They are eligible for the degree of L. L. B., to be sure, but only upon the performance of such additional work as may not only not benefit them, but be a hardship as well. The law school of Harvard University is open to special students, but it is not against the rules regarding their admission that our criticism is directed.

We are of the opinion that a rule which limits regular enrollment in a law school to "degree men" is an unwise and an un-American rule.

LAW SCHOOL NOTES.

E. F. JOHNSON, EDITOR.

H. C. WALTERS, ASSISTANT.

Two new debating societies have been formed, the "Benton" and the "Griffin."

New students are still coming in, and there are now enrolled about five hundred and sixty.

Those assisting Mr. Vance in the law library are Percy Rowe, a post graduate, and M. L. Clawson, a senior.

Prof. Mechem is taking up "Reeves Leading Cases on Wills," in connection with his branches of work with the seniors.

The Michigan club court possesses an ex-clerk and an ex-deputy sheriff. An endeavor is being made to get an experienced lawyer to preside.

The '94 class is graced by two one year women, Lula B. Richardson, of New York city, and Emma Eaton. There are two women in the junior class.

H. W. Webber, class of '94, contributed an interesting and instructive article to the October number of the "Islander" on the "Foreign Element of New York City."

The S. L. A. controversy has been settled and J. W. Powers, class '94 law, will preside over half the lectures, and W. W. Wedemeyer, class '95 literary, will preside at the other half.

At the October meeting of the board of regents Alexis C. Angell and Otto Kirchner, both of Detroit, were appointed instructors in the law department. Both of these gentlemen have done work in the department before. Mr. J. W. Dwyer, of the post graduate class of '93, and Mr. Hughes, of the post graduate class of '92, were appointed as quizmasters for the ensuing year.

E. M. Walsh, special Hawaiian commissioner to the world's columbia exposition, has entered the law department. Mr. Walsh went to Hawaii from Connecticut in 1880, where he began the practice of law. He states that the system of jurisprudence is quite similar to that of

many of our own states. They have supreme, district and circuit courts, as well as those of lesser jurisdiction. A great many young American lawyers have begun practice there since the country came into notice.

James A. Bordeau, class '93, president of the democratic club, has located in Detroit. R. J. Willis is also in Detroit. W. N. Smelser is in Kansas City. J. J. Knight is in Oregon, and F. H. Kleekamp is located at Fort Wayne, Ind.

"The Wrinkle," the new university publication, has made its appearance on the news stands. As might readily be divined from the name, it is of a comic nature. Some of the illustrations and jokes are of merit. Others again are rather crude.

The following member of the class of '93 are taking the post graduate course: Mary Benson, I. K. Friedman, F. J. Griffin, L. F. Harms, J. S. Henton, R. A. Howard, J. B. Hoy, F. G. Jones, I. B. Lipson, F. B. Mulhouse, Percy Rowe, C. W. Scrutchin, O. F. Sessinghaus, W. C. Swan, J. H. Van Tassel, W. T. Webb.

The annual election of officers of the law class of '94, took place on Saturday, Oct. 28th. The names of those elected cannot be given until the next issue. Those mentioned in connection with the office of president are A. L. Bissell, formerly a western man but now of Ann Arbor, J. A. Clark, Ohio; W. V. Elliott, Colorado; E. M. Wellman, Nebraska; and J. J. Sheridan, Michigan.

Prof. Mechem is the author of a new and valuable work on "Leading Cases on Agency." This work is published by Callaghan & Co. It consists of a collection of two hundred and thirty important cases upon the law of agency. They are arranged according to the classification of Mechem on Agency, and are designed to illustrate the principal subjects of agency. Although designed primarily for the use of students, it will prove of equal value as a reference book to the practitioner.

Prof. Levi T. Griffin has been nominated by the democratic party of the first congressional district of Michigan to contest with the republican candidate for the honor of filling the place made vacant by the death of J. Logan Chipman in the United States house of representatives. This so aroused the enthusiasm of the class of '94 that they composed a yell to fit the occasion. The first time Prof. Griffin appeared before the class after the nomination he was greeted with rousing cheers. The class arose in a body and delivered itself as follows: "For Griffin, for Griffin, hurrah! hurrah! Griffin for congress, '94 law!" The following resolution was tendered the professor on behalf of the class:

Law Department, University of Michigan, October 13, 1893.

TO THE HON. LEVI T. GRIFFIN:

Whereas. It has come to the knowledge of the senior law class, through the public press, that you have been nominated for the honorable

position of representative from the first congressional district of Michigan, to the house of representatives of the United States; and

Whereas, At a meeting held this morning, a committee of three was appointed to draft suitable resolutions; therefore, be it

Resolved, That prompted by an appreciation of your worth and fitness for the position, we, the senior law class, extend to you our most hearty congratulations and indorsement of your candidacy, and further be it

Resolved, That a copy of these resolutions be presented to you, and that duplicate copies be furnished for publication to the *U. of M. Daily* and the *Detroit Free Press*.

CHAS. A. DENISON,
H. W. WEBBER,
H. V. RICHARDSON,

Committee.

One of the most important events in the history of the law department is the establishment of the practice court. This has been hoped for for several years, but it is now to become an accomplished fact. The regents at their recent meeting provided for its organization, and Prof. Mechem will have charge. It will be conducted upon substantially the same lines as the court voluntarily organized by him last year and which proved so popular with those who participated. It will practically supersede the former moot courts, their work being merged in that of the practice court. It will be a new departure in law school work, as no other institution has attempted to conduct one upon the same plan.

The court will hold daily sessions during the second semester, and every senior will be expected to take part. It is the intention to give to every senior an opportunity to bring to an issue of law, and dispose of, a case on agreed facts both at law and in equity. This issue will be reached by pleadings either at common law or under the code, as the system prevailing in the student's own state shall determine. These issues arising on the pleadings will be sent for argument to the professor having that branch in charge, i. e. to Professor Thompson in equity; to Professor Griffin in common law; and to Professor Johnson in code pleading. Issues in criminal pleading will be sent to Professor Knowlton.

In addition to this, actual cases of fact will be devised which will be assigned to students to conduct through all their stages, including a trial by jury, and an appeal to the supreme court if desired. The work of attorneys, witnesses, jurors, clerk and sheriff, will all be conducted, as in actual cases, under the supervision of Professor Mechem. In this department, it is expected that each student will have an opportunity to personally conduct at least one contested case upon the merits. Four students will be assigned as attorneys, two for each side. The remaining students will be divided into sections for the performance of duty as jurors, witnesses, court officers, and the like, thus giving each one additional opportunity to acquire by observation and practice the knowledge of the actual conduct of cases. These cases will be conducted according to the law and practice of the attorneys' state, the jurisdiction being determined and the proper venue laid as though the same had actually arisen in that state.

The remaining members of the faculty will sit from time to time as an appellate court to review errors of law committed upon the trial.

MONTHLY RECORD OF SUPREME COURT DECISIONS.

AGENCY—Proof of authority—Pleading—What may be shown under general issue—Subscription, right to show violation of conditional agreement in suits to recover. *Davis et al. v. Kneale*. Hooker, C. J. Reversed and new trial.

BILLS AND NOTES—Accommodation maker, when held to be—Evidence. *Devereaux v. Estate of Phillips*. Hooker, C. J. Affirmed.

CORPORATIONS—Stock subscriptions—Estoppel—Waiver. *I. F. & E. Assn. v. Walker*. Affirmed.

CORPORATIONS—Dissolution, power of stock-holders to bring bill for—State alone can enforce forfeiture. *Heap v. Heap M'fg Co.* Montgomery, J. Reversed and bill dismissed.

DETROIT CITY COUNSELLOR—Powers of mayor as to appointment—Right to revoke appointment—When mandamus lies to compel approval of bond. *Speed v. Common Council of City of Detroit*. Montgomery, J. Mandamus granted.

DIVORCE—Evidence of marriage, when bill properly dismissed for want of. *Van Dusen v. Van Dusan*. Hooker, C. J. Affirmed.

ELECTORS—Right of women to vote in school, village and city elections—Constitutionality of act No. 133, Pub. Acts 1893. *Coffin, et al. v. Board of Election Commissioners of Detroit, and Kennedy et al. v. Pingree, Mayor, et al.* McGrath, J. Mandamus denied in former and granted in latter.

ESTATES, claims against, when cannot be set off as counter claims in suits, by administrator—Status of tardy claim after allowed. *Quinn, Adm'r, v. McGowen*. Long, J. Affirmed.

EXEMPTIONS—Respective rights of husband and wife as to property exempt from execution under How. Stat., § 7686, subd. 8. *Miller v. Miller*. Grant, J. Reversed.

FRAUD—Proof necessary to set aside conveyance and grounds of fraud. *Montgomery, J.* Affirmed.

FRAUDULENT CONVEYANCE—Right of administrator to file bill to set aside conveyance made by deceased to defraud creditors—Admissibility of parol proof of order of probate court which has been lost. *Hand, Adm'r v. Breckenridge et al.* Montgomery, J. Affirmed.

FRAUDULENT CONVEYANCE—When conveyance to trustee absolutely and not as mortgage held to be invalid as against creditors of attachment debtors. (*Keudall v. Bishop*, 76 Mich., 634, followed.) *Pettibone v. Byrne*. McGrath, J. Reversed.

HUSBAND AND WIFE—Sale of property by husband with consent of wife—Contract as to application of payments. *Gillett v. Knowles*. Montgomery, J. Reversed and new trial.

LIBEL—Right to show reputed wealth of defendant corporation—Liability of corporation for malice of one of its stockholders—What necessary to be shown to justify charge of bribery—Evidence. *Randall v. Evening News Ass'n*. Grant, J. Reversed and new trial.

MASTER AND SERVANT—When master not liable for injuries occasioned by following advice of servant given outside scope of his employ-

ment—When railroad company not guilty of negligence for permitting plaintiff upon its grounds. *Keating v. M. C. R. R. Co.* *Montgomery, J.* Affirmed.

MUNICIPAL CORPORATIONS—Degree of care required in construction of cross-walks—Liability for injuries on defective cross-walks. *Bigelow, Adm'r, v. City of Kalamazoo.* *McGrath, J.* Affirmed. (*Montgomery, J.*, dissenting.)

NUISANCE—What constitutes abatement, and how made. *City of Grand Rapids v. Weiden.* *McGrath, J.* Reversed.

PLEADING—What declaration must show, to recover special damages upon breach of contract modified by subsequent agreements. *Penwell v. Wilkinson.* *Montgomery, J.* Reversed and new trial.

RECEIVER—Chancery practice—When receiver may be appointed in certain cases. Judgment creditor's bill, what to contain. *Dutton v. Thomas, et al.* *Hooker, C. J.* Affirmed.

SALE ON APPROVAL—Acceptance, when implied, and when question for jury—Duties of purchaser in sale on trial—Costs on appeal—Practice—Statements of counsel to jury. *Turner v. Muskegon M. V. F. Co.* *Grant, J.* Reversed.

SCHOOL DISTRICT, alteration of, what steps necessary in order to be legally made. *Burnett et al. v. Board of School Inspectors of Chickaming Township.* *Grant, J.* Certiorari. Proceedings quashed.

SETTING ASIDE CONVEYANCE—When children who permit third person to purchase land of father estopped from asserting his mental incompetency—When failure of purchaser to disclose prospective construction of railroad not fraud. *Burt, et al. v. Mason, et al.* *Grant, J.* Affirmed.

SUMMARY PROCEEDINGS—Title, how and when may be pleaded. Adverse possession. *Bither v. Bertrand.*

TAXES—Failure of chairman of board of supervisors to sign records, etc., fatal defect in tax proceedings. *Auditor General v. Hill.* *Hooker, C. J.* Petition for sale dismissed.

WILLS—Revocation—Evidence—What admissions admissible—Proof of later revoking will not produced. In re. *Estate Annie Lambie.* *Cameron v. Neil.* *Hooker, C. J.* Reversed.

BOOK REVIEWS.

PRINCIPLES OF SELF GOVERNMENT.—The Principles of Self Government applied to Townships, Cities and Villages. By Andre Matteson. Chicago: The Legal Adviser Publishing Company.

This monograph of forty-eight pages is an exceedingly interesting and readable little book. It is in two parts. The first part is, with a few changes, the paper read by the author before the World's Auxiliary Congress of the Columbian Exposition, August 9th. It is entitled "Local Self Government," and sub-divided into three sections: (1.) Its foundations; (2.) Its adversary, and (3.) Its application in the city. The second part, "What is the city?" is also treated under three heads: (1.) The politician theory and the law; (2.) The city a business community, and (3.) The remedy. The evils of special government in every form, and of the constitution of cities on the political basis, form the author's two bases of attack, and for which he proposes self government as a remedy. The book should be read by everyone immediately interested in municipal government. Much food for reflection will be found in what the author says, though a few of his ideas will probably meet with very little approbation.

NORTON ON BILLS AND NOTES.—Hand-book of the Law of Bills and Notes. By Charles P. Norton, Lecturer on Bills and Notes in the Buffalo Law School. St. Paul: West Publishing Co.

Very often, now-a-days, we see enumerated as one of the first merits of a book, that it is "adapted both to the needs of the student and the requirements of the profession." Sometimes the author is fairly successful in serving his two masters. But too often the attempt to carry out this dual purpose lessens the value of the work to both classes for which it was designed. It may be safely said that, as a rule, the author who contents himself with carrying out one purpose or the other will be the more successful. Professor Norton has gone upon this theory in preparing this work. He has prepared a book expressly for students of law, wherever they may be found, either in the law office or the law school, and has eliminated everything not essential to the student. The necessity of a most thorough knowledge of the fundamental principles relating to this important branch of the law is too well known to require comment.

Both the author and publisher have kept the needs of the student constantly in view. The mechanical and typographical arrangement is most excellent. In this, the plan of Professor Knowlton's "Anson on Contracts" is quite closely followed. Black letter paragraphs, running through the book, giving a brief analytical presentation of the principles and rules of the subject, constitute a complete but concise synopsis. After reading the commentary which follows, a recurrence to these analytical paragraphs will fix the principles firmly in mind. At the end of each chapter are given several problems, in the form of hypothetical cases, al-

most any of which may be any day met with in actual practice. For the purpose for which it is designed the work is certainly most admirably adapted. It will, without doubt, be adopted as a text-book in many law schools.

KEENER ON QUASI-CONTRACTS.—A treatise on the law of Quasi-Contracts, by William A. Keener, Kent Professor of Law and Dean of the Faculty of Law in Columbia College. New York: Baker, Voorhis & Company.

We have been wanting to see this book ever since its preparation was announced. We felt particularly interested in it for two reasons: First, because of the novelty of the field which it occupies, or rather because it enters upon a field heretofore unoccupied; second, because we have lately become greatly interested in the author, particularly his methods of imparting legal instruction, and have at least one mutual friend who delights to acknowledge his personal acquaintance. A careful examination of the work has not disappointed us in our expectations. It is just such a work as one would expect from the pen of so able a writer as Professor Keener. It has a field practically all to itself. No attempt has before been made to treat in anything like an exhaustive manner the topics covered by this work. The term "quasi-contract" has been substituted for "contract implied in law," and under it is included all that large class of rights and obligations arising independently of the doctrines of either contract or tort. This work may properly be called the "missing link" in the treatment of the law of contract and of tort. The author's position is clearly defined in the first chapter in which is considered the nature and scope of the obligation. He objects to the treatment of quasi-contracts (or contracts implied in law) as a species either of simple contracts or contracts of record. He very logically insists that it is a question of intention purely, a genuine contract resting upon, and a quasi-contract existing independently of intention. He distinguishes clearly between quasi-contract and tort, and gives a great variety of illustrations of quasi-contractual obligations in the opening chapter. We would like to refer to each chapter at length, but space will not allow us to give more than the chapter headings, which are as follows:

- I. Nature and scope of the obligation.
- II. Recovery of money paid under mistake.
- III. Waiver of tort.
- IV. Rights of a plaintiff in default under contract.
- V. Obligations of a plaintiff in default under a contract.
- VI. Recovery for benefits conferred at request, but in absence of contract.
- VII. Recovery for benefits intentionally conferred without request.
- VIII. Recovery for improvements made upon the land of another without request.
- IX. Recovery of money paid to the use of the defendant.
- X. Recovery of money paid under compulsion of law.
- XI. Recovery of money paid to the defendant under duress, legal or equitable.

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AMENDMENTS OF PRACTICE VS. CODES OF CIVIL PROCEDURE.

GEORGE W. MOORE.

In the July number of the MICHIGAN LAW JOURNAL, Mr. Alfred Russell gave his objections to a code. They are nearly unanswerable, and I do not think that the reply of Mr. Maxwell, or the article by Mr. Johnson in the October number, gives any important reason for embarrassing Michigan with a new code of practice.

Our proceedings under the common law practice, as modified and already somewhat codified by statute and court rule, are plain and give rise to very few of what are termed "practice cases." Every code state has volumes of them, and they illustrate the fact better than anything else that, instead of the code settling the practice, it completely unsettled the practice, and, after many years it is still in a chaotic state. As an illustration of this, the writer was a short time since conversing with an eminent lawyer of Connecticut where a code prevails. He stated he had brought a simple case, and by reason of demurrers and objections that had been made, he had been unable to even get the case at issue for more than a year, although he had done the best he could. He heartily denounced the uncertainties and delays to which the code gave rise. This is an epitome of the experiences that might be related by any lawyer practicing under a code. The writer has heard similar statements from attorneys regarding the codes of Iowa, Ohio and New York.

A difficulty always experienced in radical departures in law is, that there is an abandonment of old things that are good and necessary in the attempt to reform and simplify. Codification has in practice always resulted in complication rather than simplification. The reason is obvious. No human mind can anticipate the results of the application of new statutes to unknown facts.

and the courts are necessarily called upon to construe things that were not in the mind of the constructor of the law. No better illustration of this difficulty can be found than in the legislation known as the "statute of frauds." This simple statute required certain classes of contracts to be in writing, that the difficulties of verbal evidence should be avoided. It was passed centuries ago. It has been substantially adopted by all English speaking governments. Volumes are filled with the cases illustrating its application, while new cases are constantly arising.

There seems to be a very wide misapprehension that Chitty's forms are part of the law and must be followed. This is, of course, absurd. Any statement of a cause of action that is good and sufficient under the codes is, and always has been, good and sufficient at the common law, and the common law statements are of course good under the codes. The quaint phrases of centuries back can be replaced at will by those more modern if anybody prefers. The language of Chitty may be changed, condensed or expanded at pleasure if a cause of action clearly appears. There is no more need of any precise form or phraseology at law than in a chancery bill, and there is just as much.

Much loose talk of the desirability of abolishing forms of action is indulged in, but every complaint must state a cause of action and the relief desired. This is all that there is in technical "forms of action," and so much is absolutely necessary. "Form" is, in fact, the substance, and is an aid to the pleader, not a difficulty. All that the most exacting code pleader could ask, in this regard, would be met by a brief four line provision that a person who had mistaken his form of action, or the relief to which he was entitled, could amend at any time and upon such terms as did not prejudice the rights of the opposite party, to the end that justice should not fail. Many who insist upon a code do not apparently understand the merits of our present system, or the disadvantages of a code. With a few changes, some of which are suggested below, our system is about as simple as possible, and most of the changes can now be made by the supreme court by rule, or otherwise, under their present powers,¹ and doubtless many of them would be made if anybody interested would carefully formulate and present them.

The declarations on the common counts have been reduced so that each count which formerly took a page now occupies but a

¹ See Art. IV, § 5, Constitution of Michigan.

line. Under the codes from one to three pages would probably be used by most lawyers in making the same statements. The declaration in ejectment has been formulated by statute so that it now occupies perhaps half a page. A young code attorney would certainly take several times this space, and probably make a bad pleading in the end. Our plea of the general issue simply demands a trial in a single line. A code answer would be very much longer. Our customary declaration in replevin is almost as short and direct, but if thought desirable it could be condensed, by rule or statute, to the bare statement that the plaintiff claims certain property described, that the defendant unlawfully withholds it, stating its value, and that the plaintiff desires the return of the property or judgment for the value. The action of trover could be made in substantially the same form. The allegation of previous demand might be omitted in the declaration, and lack of demand, where necessary, could be set up under the plea as a defense, by a simple notice. In case of qualified ownership in the property replevined, etc., the declaration might simply state that the plaintiff claims a lien upon the property described for a given amount, etc., that defendant unlawfully withholds it from him, and that the plaintiff asks judgment for the return of the property or that his lien be satisfied therefrom.

In actions of trespass and trespass on the case, outside of those above referred to, it might be provided by statute or rule that the case, if stated in the manner customary in chancery actions, should be sufficient as to form, but there is no process or method of practice under the code or at common law where the pleader could or should avoid stating what his cause of action is, what he claims, and what he asks the court to do.

There is one thing which is always very "taking" to a young lawyer, and that is, the proposition of joining several legal and equitable causes of action in one proceeding. The old and experienced lawyer knows how difficult it is to discuss a single issue clearly and well, and how certain it is that more than one will confuse the court, who has but just heard of the case, and is obliged to consider it under pressure among a multitude of others. To illustrate this, in a recent case in New York, where the pleadings were prepared under the personal supervision of counsel so eminent as Evarts, Choate and Beaman, involving more than \$100,000, several issues were presented in the same complaint against the protest of the Michigan lawyer. Mr. Choate person-

ally and ably, in the short time allowed by the court rules, argued it in the court of appeals, saying, "We shall win it." What was regarded as a side issue, the court of appeals caught upon as decisive, and he lost his case. This is certain to result in many cases where the issues are increased.

In jury cases a single issue is usually more than their unskilled, inexperienced minds are able to comprehend and retain until the end of the case. There are, nevertheless, some changes that might be adopted to advantage, either by statute or by rule of the supreme court. The statutory method of commencing suits by declaration now requires an entry of a rule in a rule book which has no other office. Then a first default and second default are required to be entered. Each of these are useless. The book serves no useful purpose. A notice to appear and plead, and, in case of default, a proof of service, with the direction to the clerk to enter the default in the calendar, is quite sufficient; and one default is as good as a dozen.

A statute might be passed providing two methods of commencing ordinary suits, whether at law or in chancery; one by a writ requiring the defendants to appear and plead, the suit to be technically regarded as begun when the writ is placed in the hands of the sheriff for service; and second, by filing in court and serving the original declaration or complaint upon the opposite party, with notice to appear and plead thereto within a definite time, or, in default thereof, judgment would be entered. There is in New York a useful provision, which is in use in Michigan in railroad proceedings to condemn land, and which might be adopted here generally. Nothing is preliminarily filed in court, but a copy of the proposed declaration or bill of complaint is served on the defendant, with notice that on a certain day a copy thereof will be filed in the court and judgment asked thereon unless plea is filed. A practical result of this is, that a very large percentage of suits are settled without ever appearing in the court files and without expense.

So far as getting cases speedily tried by the court is concerned, nothing can be devised that will wholly obviate difficulties arising from prior engagements of courts, parties, witnesses and attorneys, and the time necessary to the preparation of contested cases. A large limit of elasticity is absolutely necessary. Arbitrary practice may dispose of cases, but will defeat justice. The experiment might be adopted of abolishing terms of court and

notices of trial, as now made, in circuits where courts are in practically continuous session, and in lieu thereof either party could give notice to the other after the case is at issue that they will appear in court, on a date named, and ask that the same be set for trial for a day certain. This date would be determined primarily by the cases already set, and, secondly, by the engagements of the attorneys, parties and witnesses. This will abolish at once the long calendars and many of the difficulties incident to calling and adhering to the docket. The practice of the justices' courts is analogous to this. This might or might not be found to work well in practice.

We would say in conclusion:

First. That the common law forms of action are fundamentally descriptive of the actions themselves, and to that extent are necessary or, at least, useful.

Second. There is no necessity for the dismissal of suits by reason of a party having chosen a wrong form. The writer does not remember a case where that difficulty has arisen in his own practice, or that of others. If the reader will try to recall all the cases within his knowledge, where the forms of action were troublesome, he will find they are not numerous, nor the difficulties important. Any not now provided for by our statute and court rules for amendments, can be easily obviated by adopting another, as above suggested, to the effect that where facts are pleaded and proven, making out a just cause of action, legal or equitable, the form of action brought shall not be considered material, but may be changed by amendment at any time before judgment or decree, on such terms as may be just.

Third. As to the union of several causes of action in a single suit, it is obvious that it often causes confusion and may cause defeat. The same object can now be reached by bringing actions separately, and the court, upon request, would assign them for trial at the same time, and they could be heard upon the same testimony. This is scarcely more expensive, quite as expeditious and tends to accuracy and clearness.

Fourth. A provision might be made by statute or rule, that where, by the pleadings or upon the trial, it appeared that justice required relief, legal or equitable, other than that asked for by the original declaration, it could be granted upon supplementary proceedings by petition made in the original cause. In practice this would be seldom needed, but would sometimes be useful.

With a few other minor changes and those suggested, it would be difficult to see what could be gained in Michigan by abandoning our present practice and taking up a new one. It is scarcely worth while to experiment on a large scale and introduce a new practice with which the bar is unfamiliar, through new and therefore crude legislation. To abandon the wealth of experience, well settled principles, convenient forms and definite value of the common law practice, seems like cutting off a leg to remove corns. Is it not wiser to suitably treat such excrescences as may be found to exist, without resort to radical measures?

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POLITICAL REFORM IN THIS COUNTRY.

C. A. KENT.

Our government is based on manhood suffrage. The majority is our king. It has always been customary for countries to praise their monarchs. Our politicians follow this example. They are ever extolling the honesty and intelligence of the people. Hence the maxim, "*vox populi, vox Dei.*" Doubtless these praises are often sincere. And it may seem for the best that the king, whether one or many, on whose decision a mantle must rest, should be thought to be honest and wise. Still, the chief motive of countries and politicians is the same. They want something, and have found out that rulers are pleased with commendation. But their views can hardly be accepted by an impartial observer. And we cannot well discuss political reform without some consideration of the character of the monarch who must decide. What then is the general character of our citizens? What purposes control their votes? It is evident that different answers to these questions may be made, as to different states, or even different localities of the same state. The people of Texas differ from those in Vermont. The majority in Burlington may be controlled by different motives from that of a country town. Not all voters wish the public good. Those who belong to the criminal classes desire to pursue their occupations without disturbance from the police. Those who pay no direct taxes are not likely to be much impressed with the necessity of public economy. And there are people, intelligent, cultivated and rich, who feel such a repugnance to mingling on equal terms with the common people, that they participate in political life but little, if at all. Many voters have been educated in foreign countries under circumstances which poorly fit them for the responsibility of becoming governors. In language, customs and principles they are aliens to our people. Some have a deep seated prejudice against all government. They confound liberty and license. In some parts of this country there are many who cannot read and write. How can such persons judge intelligently of public measures or candidates? It is commonly believed that even in some of the most intel-

ligent states there are many who sell their votes to the highest bidder. Everywhere, and of necessity, the people must have political leaders. What qualities do most to give a man such leadership? The voters must act largely from habits and prejudices, since this is the nature of all human action. To ascertain the main prejudices which prevail in a locality, in a state, or in the nation, is of great consequence to the reformer as well as to the politician. It may be assumed that the political action of every one is influenced by what he thinks promotes his personal interest, and that with very many this motive is much stronger than a desire for the public good. But only office seekers or those who sell their votes, have a clear rule to determine their personal interest in an election. A citizen of the highest candor and ability may be puzzled to determine whether a tariff for revenue only or for protection will help him. These and other considerations lead one to doubt that there is necessarily wisdom in the decision of majorities. The people may certainly be deceived. Every defeated politician will admit this. And are there not localities where the majority do not wish the public good? Tammany rules the city of New York through its control of the voters. Is its practice of selling offices to the highest bidder devised for the good of the community? We may still hope that the majority of the voters in this country vote for what they think best for the public interest. But it is much to be feared that there is a large minority not controlled by this motive, and that this minority may grow. All theories of political reform must be based on a thorough knowledge of the wishes of the governing power. What the majority continually and earnestly desire is likely to be accomplished, and reforms not based on the character of the people will be transitory.

The will of the people cannot be brought to bear directly upon political questions. It can be exercised only through representatives, who are for a period the real governors. The chief of these representatives are elected by the voters, but very many are appointed by the executives of the nation, state, or city. It is not easy for the people to ascertain the true character of candidates who ask their suffrages for even the highest offices. The character of a candidate for the presidency is usually obscured by party praise and detraction, equally unmerited. And it requires much more time and pains than voters will give to ascertain the qualification of candidates for municipal offices. An executive who has

the power of appointment, may select officers with much more regard to their fitness. But the wisest executive can have no personal acquaintance with many of his appointees. He must rely upon recommendations which are often utterly untrustworthy. Officers once chosen administer the different branches of the government during their terms. As to important matters, they may be restrained by the general principles announced by the party to which they belong. But as to many new questions they may administer affairs as independently as hereditary governors. But their acts are subject to public criticism. The conduct of each one can be discussed, and for this he is held responsible. Officers are therefore much more influenced by praise or blame than the voters. The latter are protected by their obscurity, their number and their power. But officials, who must live in the public eye, are sensitive to the criticism of individuals, who are not their constituents, and who have nothing to do with their continuance in office. Almost all men desire to be esteemed by the best judges. And it is a fortunate thing that lasting reputation cannot come from the admiration of the ignorant and the vicious. These classes are too fickle, and then, they may not read the papers or the books, through which reputation is communicated and perpetuated. The power of public opinion, formed after full and free discussion, is the greatest safeguard in popular governments.

Some offices are sought for the pecuniary rewards they afford. It is not often that such positions command the best talent. Government places are insecure. The terms are short. The seeker may have to spend much time and money to get a position. He must do very disagreeable things. A candidate for an elective office must first secure the favor of the politicians of his party. He must then make the most strenuous efforts to gain votes in his favor. Where offices are filled by appointment, the pursuit is less difficult. But even here the contests of opposing candidates and their friends often become very disagreeable. Most inferior government employees do less work than similar employees of private persons. This is a consideration which will influence only the lazy. Government business is permanent. It remains mainly the same for many years. Hence when a department has been organized by a competent head, the system is likely to continue through succeeding administrations. Raw employees brought under a good system learn their business readily, as do recruits drafted into an

old regiment. Hence the great departments of the national government have been conducted in a better manner than might have been expected from short terms of the office. The evils of frequent changes are more conspicuous in municipal and state, than in the federal government.

There is often a great strife for offices to which no pecuniary reward is attached. Many very competent men are willing to serve the public from a love of honor, or power, or public usefulness. If the government could only select wisely it could get its work done to much better advantage than could private individuals. But here lies the great difficulty. There is nowhere any organized body of citizens whose aim is to pick out the best men. If there were such a body the choice would often be different. No man may stand pre-eminent in fitness. Merit is never the sole nor probably the chief recommendation for any elective office. The men who are looking after candidates are generally politicians, whose notions are not the highest. They are seeking some one who can be elected, and who when elected will remember his friends. Unfortunately fitness even of the highest kind often goes but a little way in securing an election. The mass of voters are not good judges of fitness. And there is much too little belief in the necessity of special qualifications for even the highest office. Perhaps government based on manhood suffrage tends to foster the idea that every voter may aspire to any place. At any rate we have many men who seek the highest places when they have never given the slightest proof of qualification. If a man acquires wealth he may successfully aspire to be a United States senator, though he has no fitness for the office. To be able to manage caucusses and conventions and legislatures is the one indispensable requisite for election to high places. And the man who wants an office must usually seek it very earnestly. Friends may help, but they must be organized to render their aid efficient. It needs the spur of personal interest to make one do the work necessary for success. And the competition for the highest positions is so great that he who would succeed must use every means which will tend to accomplish the result. A candidate may perhaps be too immoral, too unscrupulous for success. But he may also be too moral, too scrupulous. And the latter qualities are more likely to produce failure than the former. With most politicians, as with most lawyers, the great aim is to win, and no means are likely to be rejected which will lead to the desired re-

sult. And it is in politics as in other occupations. The moral notions of the men engaged in a business will conform to the necessities of the business. The men who in any occupation are too scrupulous to do what is necessary for success must get out of the occupation or fail. There are in every employment enough persons who will allow no scruples to interfere with their aims. If permanent political success can be secured by corruption or fraud, there will surely grow up a class of politicians who will use the required means. The only way to prevent the use of such means is to make them unsuccessful. Purity in politics will be established only when purity is necessary to success. We must judge politicians as we judge men of other countries or another age, not by the highest ideal standards, but by such rules as the necessities of the business make essential to success. The failure to make due allowance for these considerations leads to harsh judgment of political leaders. We say that our executors should make their appointments with sole reference to the public good, seeking to reward neither friends nor foes. And this is the ideal rule. But it will be adopted only when men and parties can get and keep power without paying their more active supporters; that is to say, when they can succeed by the unaided support of voters acting from no motive save that of the general good. Until then it is unwise to blame political leaders for evils growing out of the necessities of political life. Some one may ask whether I intend to justify the use of any means necessary to political success. I do not. Neither do I condemn politicians as sinners above other men. But my purpose now is neither justification nor condemnation but a clear statement of the facts.

Officers are chosen and governments administered only through great political parties. Some consideration of the nature of these parties is essential to my subject. They must profess to be based on different theories as to the administration of government. A party cannot be formed and perpetuated on propositions that are indisputable. All parties are ready to declare that public offices are a public trust, that officials should be selected because of their merit, that the public good is the supreme end, that there should be no monopolies, that no class or set of men should be favored, and whatever other truisms are likely to catch votes. But beyond all these, each party must seek to show that it differs from its antagonist on one or more clear and important issues. Great parties are formed when circumstances produce important

questions, where there is a great conflict of interest and sentiments, and so of opinions. Thus arose the federal and democratic parties after the revolutionary war, and the republican and democratic parties of our day. But a party may not die when the issues on which it was formed have passed away. There is an enormous good will attached to any old party. People who have united in great political victories, and even in great defeats, have a bond of sympathy of enormous strength. Generations of the young may have grown up, educated to feel the strongest political prejudice. Sympathy and prejudice and the habit of voting together keep most men in the old party lines, until new issues or personal interests carry them elsewhere. The leaders of a party and the men most active in its management are influenced, in part at least, by personal motives. They are seeking the offices and reputation and power. These can be had only through the party. Hence their great interest in maintaining and strengthening the organization, and keeping alive all the forces which attach men to it. Hence when the old issues have become unavailable, the necessity of new issues, which will meet popular approval. The party in power has one great advantage. It may, if united, determine its course, and choose the platform on which it will fight a campaign, and the opposition is almost driven to accept the issue tendered.

The object of each of our great political parties is mainly to control the national government. And persons who pay special attention to politics desire to participate in this control. Everywhere there are federal offices which are in demand. Hence every party in power or in prospect of being, is likely to have supporters in every town and city. And these supporters unite not merely on national issues, but also on state and municipal. It seems the height of folly that one should vote for mayor or alderman because he is a republican or democrat. But the reason is plain. A party is strengthened by acting together as often as may be and by controlling state and municipal offices as well as national. Then, those who have business in one political capacity are more apt to unite on all governmental questions. It would be better if every election were determined independently by the issues involved in the result. This, in the frequency of elections, and multitude of candidates, would require a greater and more intelligent interest in political matters than can be expected. And there is some good as well as evil in the responsibility of a party for its candidates,

municipal and state as well as national, and in the fact that the whole ticket may suffer defeat if some are comparatively unworthy.

The internal control of a party is of great importance and difficulty. Somehow the members must unite on principles and on candidates. This union is effected in caucusses and conventions. The foundation is the primary, held in each ward or township. The object of a primary is to nominate local candidates and to choose delegates to conventions, who nominate candidates for the higher offices. The organization of primaries is almost necessarily loose. They are voluntary associations meeting for an hour and then dissolving. It is hard to force them under the control of law. Many, perhaps most of the members of a party do not attend. Those who do, usually have some personal object. They are seeking some position or trying to aid friends in such pursuit. Under the most favorable circumstances a caucus is likely to be controlled by active politicians, and that faction in it which displays the most energy in bringing out its supporters. In large cities the primaries are often controlled by the greatest frauds. The committee who receive and count the votes can exercise the most arbitrary power. Voters may not know each other. The committee, if so disposed, may receive votes from those not members of the party, or coming from outside the ward, or voters may be allowed to vote more than once. The grossest frauds may be practiced in counting the votes. An unscrupulous politician who will spend money freely can usually control the caucusses of either party in a city which I will not name. Good men are discouraged and give up attending caucusses. Often the result of a primary does not in the least represent the wishes of a majority of the party in the district. Delegates chosen at the primaries meet in convention to nominate candidates for city and county offices, or to select delegates to state and national conventions. The delegates often adequately represent the sources from which they have sprung. They may go pledged to some candidate through whose aid they have been chosen. Sometimes at least their votes are for sale to the highest bidder. The best conventions consist largely of politicians seeking personal advancement. Delegates to state conventions are of a higher class than those to city conventions. Many come from the country, where corruption is less frequent. The positions are sought by able men. Their proceedings are more subject to public opinion. Many of the ablest

men in a party participate in the national conventions. All such conventions have certain characteristics. Many of the members have been chosen in the interests of particular candidates. Every candidate must have friends to represent him. Where the contest is close there is likely to be a great deal of bargaining. A nomination is often brought about by shrewd management. Conventions, like most large bodies, are subject to be much influenced by the speeches. The controlling consideration is whether or not a given candidate can be elected. Each delegate is most anxious to favor the nominee. Hence the belief that a candidate will get the nomination does very much to secure the result. In cases where the delegates are somewhat evenly divided between several candidates, the result is liable to be determined by what seem accidents. There surely is not the least certainty that the best man will win. Conventions make party platforms. They are very emphatic in all platitudes and in denouncing their opponents, but often have a double meaning on questions in which there is party division. As the principles announced must be carried out if at all through the legislatures, they will become effective only when approved by these bodies. The majority of a party in congress may not agree with the platform of its national convention. After the conventions, comes the campaign. The issue is usually between two parties. Third parties are constantly springing up but generally they speedily unite with one of the old parties, or absorb it, or fail. As the aim of each party is to control the government, the members will hang together only so long as there is a prospect of accomplishing their object. This tendency of the consolidation of all parties in two is probably useful, since in consequence no party can get into power so weak as to be easily overthrown by rebellion. It results however in this, that the most independent voter can only choose between the two, with neither of which he may fully agree.

The object of each party in a political campaign is to strengthen the convictions of its supporters, and to bring over the doubtful vote. The newspapers and orators are like lawyers retained to defend a cause. They try to make the best possible case for their side. They use the arguments and appeals thought most likely to win. As men are more generally moved by their feelings than their reasoning powers, appeals to the former are most common. The average political newspaper and speaker seem incapable of fair reasoning. The abler men depend more on

sensible argument, but it is very seldom that a political speech does not seem unfair to the other side. But argument and appeals to prejudice are not the only, or probably the most effective campaign work. A thorough organization of the party is necessary. The opinions of every voter must be ascertained, and he must be classified. All who belong to the party must be stirred to an interest in the election. Somebody must see that they come to the polls. And wherever there are a considerable number whose votes can be bought, there are always likely to be politicians to do the buying. It is pretty certain that if an important election can be won by bribery, there will be found on one side or the other those who will do the work. And though the great leaders in an important election will seem to have no personal knowledge of the use of corrupt means, yet it is more than doubtful whether they will try to stop it when necessary to success. And it is equally doubtful whether in times of high party excitement the majority of even respectable men would prefer the defeat of their party to success through corruption.

The thorough organization of a great political party requires the employment of party workers in every town and ward in the country, and the expenditure of a great deal of money. This necessity is the cause of the great and increasing influence of rich men in our political life. The party workers wish to be paid. They of course will favor candidates who spend their money freely. That which seems a spontaneous popular demand for the nomination of a particular candidate is often but the demand by politicians for some one who will furnish the sinews of war for the campaign. The most effective organization of a party, like that of an army, requires that it be under one head, with many subordinates, all working in obedience to general orders. The controlling interest with party workers is of course the desire of success. To this end they naturally discourage all dissensions and all independence in their followers. So far as possible they would make the party like an army. They would punish all deserters and all doubters. Whatever fights professional politicians have over the nominations or the platform, when these have been decided they regard the controversy as ended, and adopt impliedly if not openly the motto, "Our party right or wrong." In the eyes of such men bolting a regular ticket is a great crime. And looking at party success as the only end they are right. In order to keep together in a party individuals must surrender much.

But if there were no limits to party supremacy, and if those who control the organization must be obeyed, however they get control, the country might be ruined by party success. But an elaborate organization is necessary to a party and men skilled in the work must be employed. And they are not likely to be more virtuous than other men. We must expect them to be influenced mainly by personal aims, expecting money or office or reputation or all three. The ideal theory of a republican form of government is, that every voter is taking a great interest in public affairs, that he is watching the conduct of public officers, ready to approve or disapprove, as justice requires, that when officers are to be elected he is on the alert to find the best man. But in fact comparatively few are taking an active interest in public affairs. The mass of even intelligent voters are fully occupied by the pursuits by which they get a living, or attain wealth or distinction. Hence the evolution of a class who pay special attention to politics is natural and necessary. It would be interesting to ascertain the causes which most influence voters. I should say that the greater number act from party association and prejudice. The intensity of the interest we take in the success of our party, simply because it is ours, is wonderful. Some are controlled by their personal interest in the public policy in issue, as those who desire a protective tariff or the free coinage of silver. Many are influenced by a still undefined selfishness, as office seekers and those whose votes are bought. And there is a considerable and growing class, whose party attachments are slight, and who change from side to side as the public good seems to require.

When a party has won and come into control of the government, the forces which influence it change somewhat. The great object of the leaders will be to retain power. An important question is the principle on which the offices shall be distributed. Appointments are almost universally made from the party in power. But shall all the old officers be displaced to make way for the new? And shall the appointees be selected for their fitness or as a reward for political service? Here there is a natural conflict of opinion. The party workers believe that to the victors belong all the spoils. And candidates for executive positions have often felt compelled to pledge the offices to their assistants, in order to secure nomination or election. And often it seems as if a party could be held together and a definite policy carried out only when an executive makes use of the influence derived from the power of

appointment. On the other hand, it is plain that one may be a very useful party worker and utterly unfitted to discharge the duties of an office. The qualities which fit a man for one place may utterly unfit him for the other. And the public service must suffer greatly, and disgrace brought on the administration if the appointments are generally unfit. Then there is growing up a considerable body of independent voters who repudiate the spoils system, and their votes may be lost to the party which adheres to it. And these voters because more intelligent have an influence on public opinion beyond their numbers. And an intelligent executive, who is seeking a lasting reputation, will have a great regard to the opinions of this class, since because they are disinterested, they are more likely to express the judgment of posterity.

Between these conflicting forces our recent presidents have taken a wavering course, inclining now to one side and now to the other. So far as the law has provided for the filling of the service through examinations they have adhered to it, and occasionally they have disregarded party considerations in filling conspicuous offices. But the lower places, not under the civil service rules, have gone to the workers, and officials of the opposite party have not been allowed to stand long in the way.

The doctrine that the offices belong to those who have contributed to the party victory seems to meet with general acceptance in our state and municipal governments. The supposed interests of the party in power have much influence in determining the administration of the government. Each party in the legislature is seeking to make capital for the next election. It judges of the wisdom of every measure by its effect on public opinion. This disposition has one advantage. It makes our legislators attend to all public criticism. But it also tends to prevent them from a careful study of the merits of public questions. Such a study can hardly be expected from the great mass of congressmen or members of the state legislatures. They get their places because they are ambitious, and are willing to spend time and money in controlling caucusses and elections. A knowledge of public questions is never essential to success, and affords but a small basis for popularity. Then the time of a member of congress is so absorbed in getting offices for, and otherwise forwarding the private interests of his supporters, and in keeping his control of the political machine, that he has no time to study difficult public ques-

tions. And the necessary organization of a party gives little chance for independent thought, except in a few leaders. In party questions every man must go with his party or lose all influence. Where there are two or three wise leaders the ignorance or incapacity of the majority may lead to no public evil, but a party consisting of incapable and ignorant members without such leaders, is in a condition pitiable, and dangerous to the public good. The work of our legislatures is often very imperfect. Many bills are considered only in committees, and passed on their recommendation. Where a question affects many people powerful lobbies besiege the legislature, and the result of the conflict of forces may be most inharmonious. No one familiar with the practical means by which statutes are passed can fail to be often disgusted with the low, personal motives which actuate many of our law makers, even in important matters. Legislative discussion is generally tedious. Men will talk, who know nothing of the subject in hand. And the same arguments are repeated over and over again to successive legislatures, because the members have not studied the work of their predecessors. It is probable that a half dozen wise men could do the work of any legislature much more perfectly, and in half the time. But if these wise men exist, the state has no means of selecting them. And perhaps popular government can be exercised only through parliaments, and the latter with all their imperfections may be necessary to the maintenance of liberty.

This sketch of our political life leads to some suggestions as to reforms. It is well to notice first some things which, however desirable, cannot be expected.

The selfishness and weakness and ignorance of human nature cannot be excluded from politics. They will appear here more rather than less than usual. And a government resting on manhood suffrage must show the imperfections of its basis. Every class of voters will have some influence. Politicians will seek its support and in return will confer favors. In some places it is impossible to enforce laws attempting to restrain the liquor traffic. The men who are in that business have so many votes that the officers dare not interfere with them. We cannot expect that the best laws will be effective, if contrary to the wishes of the majority. Political parties will not cease to exist. They are a necessity in popular governments. And they will continue to be supported largely from habit and prejudice. And the same fact

is true of religious and even scientific parties. Our ignorance and incapacity is so great that we should have no opinion on many important subjects which concern our action if we were free from the prejudices coming from education and association and interest.

The class of men who give special attention to politics has come to stay. It is a natural result of the law that labor becomes effective by division. Parties must be organized. The voters must be stirred up and brought to the polls. Some men like this business, and experience gives them aptitude for the work. The kind of workers will vary with the character of the voters. There will be different grades, and the higher will employ the lower. If a man seeks an elective office, he will have to employ persons in his interest to look after the primaries and conventions.

Politicians, like other men, work for a reward. Their anxiety to succeed will lead them to use all means likely to bring about the desired result. And they will have no morals unless inconsistent with success. We cannot expect the future in this respect to be different from the present or the past.

If in some parts of the country the only road to success is through bribery and fraud, the politicians there will take that road. And as in other occupations so in this, those whose morals are too high for the business will haste to quit it. The only way to purify political life will continue to be to make the use of improper means unsuccessful. And this can hardly be done in any community where the majority of the voters do not see that their interest and that of the public is the same.

Some necessary reforms seem practicable. The most important and most difficult is the devising in some way to make the primaries and the conventions of a party express the will of the majority. That they do not do this will be universally admitted. The cause is usually the indifference of the better classes, and they are perpetually exhorted to attend the primaries. These exhortations have proved unavailing. It is often useless for the best men to attend a caucus. They go without organization, seeking only the public good, and find themselves beaten by politicians, whose superior activity comes from personal ends. Caucuses in the best districts can be controlled by the men who seek the public good only when they organize beforehand, and take pains to bring out the voters who will act with them. And the committees who receive and count the votes may often without much fear of detection defeat the will of the majority. And in

city wards, where the voters of the same party do not know each other protection is needed against the reception of fraudulent votes. The subject is of the greatest importance. Of what avail is the doctrine of the rule of the majority, if a minority of each party may make the nominations, and the voter has no reasonable right to vote for candidates in whose selection he has had no voice. One remedy would be the voluntary organization of the voters of a party in each district, in such way that there should be a list of the persons entitled to vote, with their residences, and time enough given at caucuses to allow of challenging and a fair investigation of all disputed claim. The success of such a plan would depend on the ward or district committee. Where this course will not be adopted the law should interfere. When a voter registers he should be required to state with what party, if any, he proposes to act. A list of the voters of each party should be prepared, and none others allowed to vote at the party primaries. These should be held, under the control of persons appointed by law, and under the penalties prescribed for illegal voting, and illegal returns at elections. It is impossible to tell without trial how such a scheme would work, but some remedy must be found for the evil or the rule of the majority in our large cities will be succeeded by the rule of unscrupulous politicians.

The great importance of having our elections pure has long been felt, and many statutes have been enacted to secure this object, which have done much good. Still after important elections there are usually charges that illegal votes have been received, that they have been fraudulently counted, and that voters have been bribed. One great safeguard against illegal votes would be the making of a longer residence necessary in the district where the vote is offered. There should be no registration allowed on election day. Such changes would be expedient though a few who qualified were thus deprived of their votes. An honest counting of the votes can be secured only by giving each party the best opportunity for watching the other. Bribery is an offence hard to prove, since the crime is known only to two persons, both guilty and incurring the penalty of the law, and hence under the strongest motive to secrecy. It would be much easier to convict if punishment was inflicted only on the giver, as the more guilty, and the receiver could testify without fear. The recent plan of having the ballots printed by the state, and compelling the voter to select his choice of candidates in a booth alone gives promise of

much good. There will be no bribery unless the party furnishing the money is reasonably sure that he will get the votes paid for. The question to be determined by experience is whether or not a man who will take a bribe can be trusted to fulfill his promise, when there is no way of ascertaining his vote. Bribery is closely connected with the increasing number of rich men who enter political life. Rich men if otherwise qualified might make the best officers. They have much to lose. They cannot devote their whole time to the public service without pecuniary distress. But when men unqualified seek official positions through their riches, they become public enemies. Relying only on their wealth, they must use it corruptly. And when such men attain high official position they are likely to seek the easy social success which comes from the free use of money, rather than to devote themselves to the hard work of understanding the public business.

Rich men might do one thing which would be to the public good. They might pay their workmen in their own money and not in offices. It would be a great gain if laws could be enacted which would successfully limit the amount of money which can be spent in seeking nominations and stations.

It would be a reform if executive appointments were substituted for elections in the choice of many city and state officers. The theory of a choice by the people is that they are able to inquire into the qualification of candidates, and intelligently choose between them. But when from the number of candidates, and their obscurity, this deliberate choice becomes impossible, an executive appointment is to be preferred. In place of a choice by the primaries and conventions as often managed, the Athenian method of selecting their officers by lot from those seeking a place, and possessed of certain qualifications, might be preferable. It would at least be more democratic. Judges and prosecuting officers ought not to be elected. The best men do not often have the qualifications which fit them to manage primaries and conventions and secure a large vote. And such officials are tempted to swerve from the path of clear duty when looking to a re-election. The increasing expenses of a campaign deter the most competent men from seeking elective office. They can do better. But there are always many who cannot do better and they press their claims with a vehemence proportionate with their lack of qualification. If the state is to be well served it must offer inducements which will attract men of the highest merit. And much less inducement will

suffice when an office comes by appointment, than when a candidate must suffer the expense and annoyance inseparable from a party nomination and from an election. No doubt executive selections are often poor, but if so, there is some one who can be justly blamed.

The terms of many offices might be extended to the public advantage. Experience is as valuable in public affairs as in other business. And this state like other employers should be able to keep the best men in its service. The scope of the civil service reform should be enlarged. It should reach to state and municipal governments as well as federal. The scramble for offices at Washington with every new administration is a national disgrace. The postponement of the consideration of the great questions of public policy until the office seekers can be satisfied, is a pitiable exhibition of the weakness of our government or of its heads. To remove from our elections the scramble for unimportant places would be an inestimable good, and probably the best men of every party would be glad of such a reform. Their influence would be much greater if they did not have to compete with politicians whose power is based on their control of offices. But the number of that latter class is so great that a movement whose object is to deprive a victorious party of the spoils of victory, and take away its power of paying the workers, is not likely to be popular with a party in power. Civil service reform must be pressed on the parties largely by persons whose party attachments are slight, who are or may easily become independents. Their influence is of two kinds. The first and greatest is this power of fair criticism. The evils which come from the bestowal of office as a reward for political work and from frequent changes on political grounds are so great that their discussion must impress all intelligent men. Then at least those who are prominent in office or in the parties are sensitive to public criticism. They desire the good opinion of all candid critics.

The second cause is their votes. This is a power which all politicians respect. In some states, where the parties are nearly equal, it has been thought worth while to cultivate the independent vote. But it is always difficult to determine the amount of this force, since those equally independent and honest acting, some from one motive and some from another, are likely to divide between the parties. Men who agree entirely about civil service reform will disagree as to the tariff. The independent movement

has been and is likely to continue a great good. It has helped to destroy the foolish prejudice which leads so many to think of the triumph of their party as in itself an end, and not merely a means to good government. It has conduced to that growing tendency, especially in municipal elections, to vote in disregard of party ties for the best men. Intelligent and candid criticism of parties and their measures and of party officials can be expected only of those not committed to either side. The best man who has publicly espoused a cause or a party, seems henceforth incapable of judging friends or foes impartially.

The greatest security in popular government is in bringing to the light of all the acts of officials and of candidates for office and their workers, with candid criticism thereon. The organs of a party seldom expose the misdoings of its members. They are afraid to hurt the party. The opposition papers are eager for the work, but they are not trustworthy. It would be an inestimable public blessing if able papers could be established which would be really independent, and would report with accuracy all facts concerning the administration of government, the means taken by parties and individuals to succeed in elections, with candid and appropriate criticism. There is no department of political life, not even the judicial, which would not be improved if every thing done was exposed to searching but fair public criticism. But it is doubtful whether such papers would receive sufficient support. Outside of scientific circles, if indeed there, there seems no considerable association whose object is to ascertain the truth, and nothing else, though the world is full of organizations intent on propagating certain opinions, or advancing the interests of a class. The position of an independent in politics is not a pleasant one. He is disliked by partisans on both sides. He cannot be the leader of any party, since for this is needed acquiescence in the party beliefs. He can seldom expect political preferment. Young men ambitious of office must eschew independency. The class which can never be large, must be recruited from men who do not seek political distinction, but are interested in politics without expecting any reward, save the public good. But the importance of independents is not measured by their numbers. The very existence of popular institutions may depend on the continuance of persons who can properly criticise parties, and when one party becomes corrupt in its methods, throw their influence on the other side.

We ought to get over the sentimental opinion that the majority have any natural or divine right to govern. Why should one wise man yield his opinion on government or anything else to that of fifty fools? There is no reason, except the fifty may have greater power. The only moral right to rule is derived from fitness. If there was one man more wise, more powerful than the rest of the community, it would be fit that he should rule all. No theist complains that the multitude of creatures are ruled by one creator.

Nature, which has pointed out in unmistakeable terms the necessity of government, has given no sure means of selecting fit governors. Hence the supreme power of a state has been the object of constant struggle, in which the strongest have won. And the struggle is going on to-day. The conditions of the struggle have changed. The people have become more intelligent and have learned their power. And notions of equity and justice have more force than they once had. And the time may come in the history of our race when justice will be stronger than any physical power, and when all will yield ready obedience to the one the fittest to govern. But to-day, as heretofore, all governments must be based on their strength and on their fitness. And the right of the majority to govern and its continuance in power will depend on the way it discharges the duties of government, and on the force physical and moral back of it. It is perfectly possible that the majority may become too ignorant and too debased to govern wisely or to retain power. Republican governments have not always proved a success. They would be certain to fail if tried to-day in many countries. An ignorant majority readily becomes the tool of demagogues and the greatest tyranny may result. In such a state of things a more intelligent and more powerful minority is likely to seize the government by force or fraud. This is what happens in some of our southern states, when the government of a majority of blacks becomes unendurable, and though the course of the white minorities was in plain conflict with the constitution of the United States, and was resisted by the federal government, it has been successful.

It is of great consequence that the basis of our suffrage continues as broad as is consistent with good government. The experience of the world shows a constant disposition in those in power to oppress classes who do not participate in the government. But if in our great cities an ignorant majority led by poli-

ticians, whose only object is public plunder, make our municipal governments unendurable, the right of suffrage should be restricted, and power taken from those too ignorant to hold it. And this should be done by law. And the legal restriction of the right of suffrage may become the only means which will prevent a revolution.

Eternal vigilance is ever the price of good government. The old monarchies and aristocracies, maintaining their power by superior force and cunning, ruled for personal ends, and oppressed the many. And modern politicians may act from the same motives and accomplish the same purposes though ruling in the name of the many. The only basis for popular government is in the wealth and intelligence of the people. Equality must be a fact as well as a sentiment or legal state. The many will surely lose their control if they become too poor and too ignorant to maintain good government. The time may come when popular government can be maintained only by legally taking away the suffrage from the vicious and the very ignorant.

No statute can keep the real power of a state in the hands of a very ignorant majority. And intelligent people are under no moral obligation to submit to the rule of the ignorant many because they are more numerous. The best attainable government is the only justification for giving the power to any class. And in judging any state we should look through all its forms, and inquire whether power is in the hands of the comparatively good or the bad, whether the state takes an unreasonable amount of the earnings of the people, whether liberty is allowed so far as may be and crime and disorder put down, whether there is a government of regular and known law, whether justice is administered equally to high and low, and the public burdens distributed according to the ability to bear them.

By these and like questions must every government, that of the majority as well as others, be tried. And there is no security that popular government will continue forever in this country, unless it fairly meet these tests.

I earnestly desire that our institutions may continue in substance unchanged, but this end cannot be obtained save through an increasing intelligence and virtue, which shall overcome the influence of that great mass of ignorant and vicious voters, on whom we have so thoughtlessly conferred the right of suffrage.

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NOTES.

THE *American Law Review*, the leading law journal of the country, and a high class magazine, has this to say concerning the Harvard departure in the requirements for admission: "Harvard University has passed a decree that after the year 1895-6 only students who have taken the degree of B.A. at some reputable college, or its equivalent, can enter the school of law. If it will guarantee that all who have taken the degree of B.A. at some reputable college possess sufficient brains to become lawyers, it will place the profession under a lasting obligation to it."

IN its November number, the *Harvard Law Review* deplores "an unfortunate error in regard to the requirements for admission" to its law school, which it says "seems to have gained general currency in the West." It refers to this journal as one of those which have fallen into this error. The editors of the Cambridge publication have evidently not read in our November number the statement of our views upon the requirements for admission to their school, as interpreted by us from their calendar announcement. In spite of the emphatic assertion in the November number of the Harvard journal, that our understanding of the matter is "absolutely false in general and in particular" and our statement "careless" and a "blundering reference," we are still of the same opinion as to the wisdom of the requirements for regular admission to the school. We can only repeat that our criticism

does not apply to the provisions with respect to special students. But there can be but one construction placed upon the calendar announcement of the requirements for regular enrollment, viz., that none but degree men, from certain preferred colleges and universities, need apply. While it is highly desirable that only cultured and well educated men should be admitted to the practice of what was once the noblest of professions, we can see no reason for making the possession of a college degree the absolute criterion of culture and education. Unfortunately the possession of a college degree nowadays is not always evidence that the possessor is even well educated, and it is unfair that such degree men should be given so positive an advantage over their less fortunate fellows, who may be fully as cultured and well educated.

THE decision of the supreme court of the United States¹ upon the question as to whether the term "high seas" is as applicable to the great lakes as to the ocean, will undoubtedly be regarded by Michigan lawyers as to them the most interesting and important decision of that court handed down during the present year. The court by a divided opinion held that the term "high seas" is applicable to the great lakes, and an offense committed upon them is not cognizable by the state courts of Michigan, but is within the jurisdiction of the United States courts. The supreme court overrules *People v. Tyler*,² in which it was held by the supreme court of Michigan that the criminal jurisdiction of the federal courts did not extend to offenses committed upon vessels on the lakes. It is interesting to note that Mr. Justice Brown, Michigan's representative upon the Supreme Court of the United States, files a dissenting opinion. Mr. Justice Gray also dissented from the majority opinion. Justice Brown says that the opinion of the court in this case inaugurates a wholly new departure in the direction of extending the jurisdiction of the federal courts. His views upon the question were fully set forth in the case of *Byers*.³ Justice Brown's argument is an exceedingly able one, and it would seem from his well known ability to handle questions of admiralty law, that his opinion should be entitled to greater acceptance as the correct doctrine than the opinion of his learned brethren, who are not as well equipped or fortified in that branch of the law. We regret that we have not space to print Justice Brown's opinion in full, for we have no doubt that it would be read with interest by Michigan lawyers.

A CHICAGO newspaper has collected some statistics of damages that have been awarded for the injury to, or loss of various

¹ *The United States v. Rodgers*, decided November 20, 1893.

² 7 Mich., 161.

³ 32 Fed. Rep., 404.

portions of the human anatomy, with a view to the determination of the actual legal value of a woman, by sections and entire. The result of this original research is found in the following table:

Head.....	\$ 1,000	Spine.....	\$ 8,958
Shoulders.....	500	Feet.....	8,600
Hands.....	9,400	Ankles.....	3,000
Wrists.....	2,000	Legs.....	10,000
Arms.....	22,500	Thighs.....	2,000
Heart.....	50,000		
Total.....			\$117,958

The inference from these figures is that, although by the law of each state, a woman's life is valued at \$5,000, yet if she is so fortunate as to lose herself by sections or piecemeal she can realize the magnificent sum of \$117,958. Our feminine friends would probably protest if we should call their attention to the fact that one female foot is worth eight and three-fifths female heads, according to the disinterested decisions of the courts, so we will refrain from alluding to the odious distinction. It is a matter of legitimate inquiry, we presume, as to whether the contents of the heads are included in this comparison.

Whenever you shake hands with a young lady, you are handling about \$16,500 worth of personal property. It is not surprising that the female heart is rated at \$50,000, since that is, according to tradition, the most sought after portion of the female anatomy listed in the above table of legal values. Yet there are those who would rate the hand as of the maximum worth, in view of the earnest striving of a large portion of the sterner sex for the hands of heavily endowed daughters. But the weight of legal precedent places the heart first, and this is as it should be.

THE fight over the city councillorship in the city of Detroit, instead of being determined by the mandamus proceedings before the supreme court, as was intimated in the last issue of this journal, is only a skirmish compared with what is to follow. In granting the application for mandamus to compel the common council to approve Judge Speed's bond, supreme court said in effect that the city counselor of Detroit could not be arbitrarily removed by the common council; that to remove him formal charges must be preferred, and a regular hearing given. The mayor of the city, acting upon the decision, immediately preferred a series of charges against his appointee, Judge Speed, which not only accuse him of gross neglect of duty, but also of treasonably conspiring with the defendants in the most important suit ever brought by the city of Detroit, the street car franchise litigation. Claiming that

the allegations contained in the mayor's charge were made for political effect, and also that the common council were prejudiced against him, Judge Speed obtained a writ of prohibition, temporarily enjoining the council from considering the charges of impeachment, which suit was returnable December 12.

Judge Speed seems to claim that the act of the legislature which it has been alleged he himself exerted great influence in having passed, elevates him above the ordinary process of impeachment, in such a way that for neglect of official duty, however gross, or even for misconduct of whatever sort, he is irresponsible wholly; that he is not answerable to any tribunal before which ordinary officials are tried, or impeached. The supreme court may entertain his position, but if they do, the decision will not be in line with their generally equitable decisions. The people would feel that the judges had allowed themselves to be imposed upon. There have been times when such decisions were commonly rendered, but they are seldom rendered these days, and especially by the supreme court of Michigan. Decisions founded on prejudice, in favor of or against certain persons, or decisions lacking the liberal, equitable principles, which characterize most of our present supreme court decisions, have done more than all other causes combined, to bring the judiciary into disrepute, and lessen the confidence of the people in our courts. The mayor's charges may not be capable of proof, but their serious and grave nature demand that they be fairly and squarely met, with a defense to the merits. If the position assumed by Judge Speed be technically possible from a legal standpoint, the supreme court will probably go a long way to find an escape from the difficulty so that officers may be held responsible for their conduct under ordinary judicial process.

THERE is food for reflection in the following extracts from a letter which we were privileged to read, from one of the most prominent public men in the state to his son at college, who inclines to the law as his chosen profession: "There used to be something of an honor attached to the legal profession, but all that is history. It has come to be so common, so sordid, so commercial, in its aspects, that it no longer follows that a man is either learned, honorable, or even honest, because he writes 'attorney' after his name. . . . The honors of the bar are of only secondary importance, a sort of 'prize ring' glory, not lasting. It wins only applause that has its roots in admiration, not respect, and never in love. It will disappoint any man that gets it. There must be love and respect at the bottom of any tribute paid to us, to confer upon us any lasting or deep satisfaction. . . . This life is not a great foot-ball or base-ball game, nor is it a college course

where wrangling is the chief occupation, where men go in and, as they get up, turn around and kick those below them, where hazing and other brutalities are needful, or rather considered so. The triumphs on the lower planes of existence I have alluded to are only momentary and not worth the cost. I think it is so in law. Every victory gained is at the cost, to some one, of either suffering, humiliation, or loss of some sort. The opportunities to prevent injustice are not the ones that pad the pocket book or the reputation. Quite the contrary. The whole profession rests mainly—not entirely, of course—but mainly, upon men's quarrels, men's evil passions, the worst phases of human nature. It is all the time in contact with the worst side of life not its best. There is enough of this worst side that we cannot escape, no matter what we do for a living, but I would not like to have you get into a business that had no other side to relieve it. There are many ways you can serve your day and generation by devoting your extra hours, when you shall get far enough along to have them, to work that is *all* for the good of your kind. You will never have any solid comfort or compensating satisfaction in anything that has not for its basis a noble, good and generous purpose."

This is a severe arraignment of the legal profession, but there is little of it that can be honestly gainsaid. It cannot be truly said that the standard of legal ethics is higher than it used to be. Professor Kent, in his article upon "Political Reform in this Country," in this number, says: "With most politicians, as with most lawyers, the great aim is to win, and no means are likely to be neglected which will lead to the desired result." Even this comment, by one of the profession, is none too severe. Herein, then, is a splendid field in which bar associations can work, but unless there are more encouraging signs of activity among them than has been shown in the past, there is but little prospect of stimulating a zeal for the moral improvement of the profession.

THE financial embarrassment and consequent assignment of Nelson, Matter & Co., one of the largest furniture concerns in Grand Rapids, gave rise to litigation in the United States court involving some novel legal questions. Nelson, Matter & Company made a voluntary assignment, under the state law, for the benefit of creditors, naming The Michigan Trust Company of Grand Rapids as assignee. Just before the assignment, several chattel and real estate mortgages were executed to secure certain creditors who were then urging a settlement of their claims. These mortgages proved only a temporary relief, however, and soon after their execution the concern was forced to make a general assignment. Its assets were about half a million dollars, and the liabilities, including contingent claims, amounted to about the same sum.

As soon as the inventory of the assignee, The Michigan Trust Company, was filed, it was concluded by the creditors, who had not secured their claims against the corporation, that even the shrewdest and most careful management of the estate would fail to realize enough to more than satisfy the claims of the secured creditors. An effort was at once made by certain foreign creditors to better their chances, and a bill was filed in the Circuit Court of the United States for the Western District of Michigan praying for an injunction to restrain the sale by The Michigan Trust Company as assignee, under the state law, and for an order setting aside the mortgages as invalid on account of preferences, declaring the assignment a common law assignment for the benefit of all the creditors, and appointing a receiver.

The Michigan Trust Company had been for several weeks acting as assignee, under the state law and under the orders of the Circuit Court for Kent County. Under the law of Michigan, as established by a number of decisions of the supreme court of the state, the mortgages given before the assignment securing certain creditors were perfectly valid, inasmuch as they were not given as preferences in the deed of assignment itself. The unsecured foreign creditors based their arguments upon decisions of United States courts which have held that preferences given in contemplation of assignment were void. Judge Severens, of the Circuit Court of the United States for the Western District of Michigan, held that the state law must obtain, and decided that the mortgages were valid. He restrained the assignee's sale under the state law, however, and heard argument upon his right to appoint a receiver. An interesting complication arose upon this point. The Michigan Trust Company had been acting as assignee under the state law, and had taken no important steps without orders from the Circuit Court of the County of Kent. If a receiver should be appointed, a question would at once arise as to the power of the United States Court to divest The Michigan Trust Company, as assignee, of the title to and possession of the assigned property which was vested in it by the state law, and transfer it to a receiver who should be subject to the orders of the United States court. If the assignee should act under the authority of the state court and in contravention of an order of the United States court, would it be in contempt of the United States court? Or, if the receiver should act under an order of the United States court which should be in conflict with an order of the state court, would he be in contempt of the state court? This complication gave birth to another one equally as puzzling. If the United States court declined to entertain an order for the appointment of a receiver or to assume any jurisdiction at all in the premises, to what court could foreign creditors with alleged grievances apply for relief? In other words, would not the foreign unsecured creditors be deprived of their right to a hearing and

redress, in view of the clause of the constitution of the United States which created the United States courts for the purpose of hearing and deciding causes between citizens of different states? One contention was that the United States court could not assume jurisdiction and assert title to the assigned property, and by so doing oust the state court of jurisdiction and title. The other contention was that if it could not do so, the unsecured creditors, as citizens of other states, would be denied their constitutional right.

It is interesting to note that the United States judge did not directly pass upon this point. He followed the state law and declared the mortgages valid, and he met the complication as to the appointment of a receiver by deciding that he had jurisdiction of the cause but upon the facts set forth in the bill of complaint of the foreign creditors, he would not appoint a receiver nor enjoin the assignee's sale, but his opinion concluded with a suggestion and recommendation that all parties interested should decide upon a course to pursue that would be the wisest under the circumstances, and that the appointment of a receiver was probably the best method. The matter was finally arranged between the different parties, and The Michigan Trust Company was appointed receiver subject to the orders of the United States court.

It is interesting to conjecture what would have been the legal result if both the state and United States courts had insisted upon claiming jurisdiction and title to the assigned property, and had issued conflicting orders in relation thereto.

The contest was managed by the best legal talent in Western Michigan, and its outcome reflects great credit upon the ability of Fletcher and Wanty, who were the attorneys of The Michigan Trust Company. The complainants were represented by Smiley, Smith and Stevens, and the various mortgagees by Edwin F. Uhl, assistant secretary of state of the United States, and McGeorge Bundy.

THE INHERITANCE TAX LAW.—The legislature of 1893 passed what is known as the "inheritance tax law," the object of which, expressed in its title is, "An act to provide for the taxation of certain transfers of property by gift, grant, inheritance, devise or bequest." The law is somewhat of an experiment as yet, and its provisions have not, of course, been construed by the supreme court of the state. A similar law has been tried in other states, and in New York, for instance, has been a fruitful source of revenue for the state. The comparative table of the amount of the tax paid into the coffers of that state each year from the time the law went into effect is as follows:

1886.....S	84,128.92	1890.....	\$1,117,637.70
1887.....	561,716.23	1891.....	890,267.54
1888.....	736,062.31	1892.....	1,786,218.47
1889.....	1,075,692.25	1893.....	3,071,687.09

There was a remarkable increase in the revenues from this source until 1891, when there was a falling off of over \$227,000. This deficiency attracted the attention of the legislature, an investigation into the methods of collecting the tax was instituted, and the law, as a result, was so re-modeled that it became impossible to cheat the state out of the tax. The fees on the inheritance tax collected by the comptroller of the city of New York during the fiscal year ending September 30, 1893, netted him the handsome sum of over \$25,000.

Michigan is just beginning the experiment with the "grave-yard tax," as some people call it. Although the new law is modeled after the New York law there is a serious question as to whether some of its provisions will be constitutional in this state if put to the test. The law is a complex one, and probably but few attorneys have given it thorough study. The following is a carefully arranged analysis of the law:

What Property Taxed.—The object of the law is to tax all transfers of property made by will, by the interstate laws of the state, in contemplation of death, or to take effect after death. The law taxes all kinds of property thus transferred, or any interest therein, or income therefrom. The tax is levied upon transfers made by residents of the state or transfers of property within the state where the transferor lives out of the state. The tax thus collected is paid into the general fund of the state.

Exemptions—Certain transfers are not taxable, as follows:

1. Those transfers of real and personal property of less than the sum of \$500.

2. Those transfers of real property where the property or any beneficial interest therein passes to or for the use of any father, mother, husband, wife, child, brother or sister, wife or widow of a son, or the husband of a daughter; child, adopted in conformity with the laws of the state; or person to whom the transferor, for at least ten years before such transfer stood in the mutually acknowledged relation of a parent; and legal lineal descendant of the transferor.

3. Those transfers of personal property less than the value of \$5,000, where the property, or any beneficial interest therein, passes to the above-named persons.

Rate of the Tax.—The tax is at the rate of five (5) per centum upon the clear market value of the property, except in the case of transfers of personal property of the value of \$5,000 or more to the persons mentioned in the above list of exemptions, in which case the tax is at the rate of one (1) per centum upon the clear market value of such property.

The Tax a Lien.—The tax is a lien upon the property transferred until paid, and the person to whom the property is so transferred, and the administrators, executors, and trustees of every

estate so transferred, are personally liable for the tax. They may sell so much of the property as will enable them to pay the tax.

How the Tax is Determined and Where and When Payable.—

The "clear market value" of the property transferred, upon which the amount of the tax is based, is determined by the probate judge, who may appoint an appraiser, upon his own motion, or upon the application of the county treasurer or any interested person. The appraisal is made as of the time of the transfer. If a future or contingent estate is transferred, and its "clear market value" cannot be fairly ascertained at the time of its transfer, it will be determined by the rule, method, and standard of mortality and value employed by the commissioners of insurance, except that the rate of interest for the computation shall be five (5) per centum per annum.

The tax is payable to the county treasurer of the county in which the probate court has jurisdiction.

It is due and payable at the time of the transfer, except that the tax upon contingent and future estates, when the "clear market value" cannot be fairly ascertained at the time of the transfer, is due and payable when those beneficially entitled come into actual possession or enjoyment.

If paid within six months after it is due, a discount of five per centum is allowed. If not paid within eighteen months, eight per centum per annum is added. Those beneficially entitled to property taxed under this act may elect, within a year, to defer payment until they come into actual possession or enjoyment, but if personal property they shall give a bond to the state in a penalty of three times the amount of the tax, conditioned for the payment of the tax and interest.

Reports of the Probate Judge and Register of Deeds.—On January, April, July and October first of each year, the judge of probate makes a report of all transfers by will or by the laws of descent, and the register of deeds makes a report of all conveyances recorded in his office which are intended to take effect after death. These reports are filed with both the state and county treasurers.

There are other provisions of the law, matters of detail chiefly, but the foregoing is an analysis of its principal features.

LAW SCHOOL NOTES.

E. F. JOHNSON, EDITOR.

H. C. WALTERS, ASSISTANT.

The registration in the department is now 581.

L. Ball, class '82, has been elected attorney of Clearfield county, Pennsylvania.

Jacob Wells, quizmaster last year, is practicing law with a firm in Portland, Oregon.

Arrangements are being made looking towards another debate with Wisconsin University.

Several debating societies have been organized in the department. The latest is the Mechem.

Cyrus Gordon, class '69 has been elected presiding judge of the forty-sixth judicial district of Pennsylvania.

Committees are already at work on the arrangements for the proper observance of the anniversary of Washington's birthday.

Edwin F. Uhl, of Grand Rapids, a graduate of the department, has been appointed assistant secretary of state by President Cleveland.

The newspapers have it that the policy of the administration in the Hawaiian matter, was shaped from advice given by the venerable Judge Cooley.

Frank L. Fowler, law, '90, has formed a partnership with Thos. E. Smurthwaite of Manistee, Mich., under the firm name of Smurthwaite & Fowler.

Prof. T. M. Cooley lectured to a large audience of law students on the evening of Nov. 13th, his subject being, "The Influence of the Habit of Thought upon Institutions."

A post graduate club has been formed with officers as follows: Presi-

dent, F. G. Jones; clerk, C. K. Friedman; crier, L. F. Harms; sheriff, Mr. Swan, treasurer, Mr. Withers.

The wife of Charles O. Morris, class '95, died at the hospital on the 11th of November. The body was taken to Washington for interment. Deceased was a granddaughter of the Hon. Frederick Douglass.

Some of the Japanese students have formed an alumni association in Japan. It includes those living within 100 miles of the place of meeting. Several of the graduates of the law department are sitting on judicial benches.

The following faculty rule has been adopted: "Students are suspended or dismissed whenever in the opinion of the faculty they are pursuing a course of conduct seriously detrimental to themselves or to the university."

B. B. Magarkar, of Bombay, India, visited the department while here filling his engagement with the Unity Club, and made a short address to the senior class. He aims to advance knowledge in America regarding India, and to unite the "practical West with the contemplative East."

The post graduates have elected officers as follows: President, Chas. K. Friedman, Ohio; vice-president, Miss M. E. Benson, Wis.; secretary, F. L. Browne, Mich.; orator, F. S. Jones, Ill.; valedictorian, J. B. Lipson, Kan.; historian, J. H. Van Tassell, Mich.; prophet, W. T. Webb, Mich.; poet, Wm. Wright, Tex.

Orson E. Scott, the publisher of the room and boarding house directory has issued a general directory containing the names of the students with their classes, home and city addresses; also the names and addresses of the instructors in the university and other information. It is a valuable little publication and is the first of its kind issued here.

The ladies of the Students' Christian Association tendered what has been described as "the reception of the season," to the law department on Friday evening, Nov. 10th. About 400 "laws" were present. Addresses were delivered by Dean Knowlton and Prof. Thompson. The dean gave an amusing account of his first case, while Prof. Thompson gave some wholesome advice regarding the necessity of integrity in dealing with clients, and courtesy to witnesses and others in the court room.

The senior laws are discussing the practicability of publishing an annual. The idea is a worthy one and should be taken hold of with more spirit by the class. The law department is a large part of the university, yet it has no distinctive annual publication. It is quite able to support an annual. The class could, without harassing the merchants of the city, issue an annual that would not be a "trade publication," but would be a credit to the university, as the "Yale Shingle" is to the Yale Law School.

The officers of the senior class are as follows: Pres., R. E. Minnahan, Wis.; first vice pres., A. A. Partlow, of Danville, Ill.; second vice pres., Miss Richardson, of Pittsburg, Pa., secretary, Miss E. Eaton; treas., G. F. Zimmerman, of Mount Vernon, Ind.; historian, L. R. Herrick, of Farmer City, Ill.; prophet, D. J. Buckley, of Pittsburg, Pa.; captain of field sports, F. Crozier, of Madison, Ind.; marshal, J. C. Travis, of La Porte, Ind.; first assistant marshal, D. H. Wingert, of Hagerstown, Md.; second assistant marshal, S. McNeal Schall, of Manorville, Pa.

The supreme court of Michigan has decided the case of *Weinberg v. The Regents* in favor of the regents. The action arose in connection with the building of the university hospital, the contract for which was let to William Biggs of Ann Arbor. He sublet a portion of the work to James Lucas, who it appears did not pay for stone used in the construction, that he obtained from one Weinberg. The latter brought an action against the regents for the value of the stone, alleging that the regent board rendered itself liable by not requiring a bond from the original contractor to secure the payment of labor or supplies contracted for by the sub-contractors. The supreme court held that the action should not have been brought against the board, but against the one guilty of neglect of duty.

On Tuesday Nov. 8th, Prof. Levi T. Griffin was elected congressman for the first congressional district of Michigan. Upon his arrival at Ann Arbor the next morning he was met by about 400 students of the department, who drew him in a carriage to the law building. When the procession arrived at the department building Prof. Griffin made a speech of thanks to the students for their overwhelming demonstration. Prof. Thompson, Dean Knowlton, and President Minnahan, of the senior class, being called on also made suitable speeches. At a meeting of the senior class the following resolutions were unanimously passed:

WHEREAS, Levi T. Griffin, of the Law Department of the University of Michigan, has been chosen by the people of the first congressional district of Michigan as their representative in the congress of the United States, to fill the vacancy caused by the untimely death of Judge Chipman; therefore be it

Resolved, That the members of the senior law class of this university unite in extending to Professor Griffin their most hearty congratulations, that his eminent ability, so long recognized by the legal profession, has been paid a tribute by the people, and a high honor most worthily bestowed; and be it further

Resolved, That it is the sense of the members of this class, and it is earnestly desired and hoped, that he may find it possible to continue his labors with them as an instructor, which have been so profitable to the department in the past; and be it

Resolved, That these resolutions be presented to Prof. Griffin and a copy of them be published in the *U. of M. Daily*.

P. L. OLIVER,
W. P. HARVEY,
A. F. BUNTING,
Committee.

Dr. J. L. High, of Chicago, a member of the faculty of the law department, and a graduate of the class of '65, delivered an address to a full representation of the department on the afternoon of Friday, Nov. 18th. His subject, "The Professional Outlook," was fully covered, being treated in a way which showed clearly that he had given the matter careful consideration. The lecture was listened to with deep interest, as the students see the necessity for the acquirement of knowledge regarding the profession, its work and status among the professions—a knowledge that is not laid down in "the books." In view of the great value of such wholesome information, and the infrequency of its promulgation, we regret that space will not permit us to preserve the speech in these pages for future reference. Dr. High stated that there was a growing disposition to subordinate the scientific aspects of the law to its practical features, to deal with the law as an art, rather than as a science. The lawyer must confine himself to his legal work, namely, the advancement of his clients' interests by all honest means, and not expect to attain thorough culture or development in other directions. There is a noticeable inclination to give no consideration to any part of the law that has not for its aim the solution of actual and present controversies. Not only is the history and symmetry of the law lost sight of, but the necessity for reform does not receive more than a passing thought. True, some changes have been made in the practice and procedure, but none to demand much attention in the system itself.

The bar, especially in great cities, is becoming more and more assimilated to ordinary business occupations. The lawyer is coming to be the trained adviser of business men in the complications which grow out of their daily pursuits in a refined and artificial state of society. The law, in its broader aspects, is a system for regulating the affairs of nations, questions of constitutional jurisprudence, the freedom of the press and of the citizen, *habeas corpus*, and all the attractive themes, which, in our college days hide the more practical part, are of comparatively rare occurrence in modern practice. The lawyer deals with questions of banking and insurance, with corporate rights and duties, with the contract relations, and other matters as varied as the business interests of his clients require. He must, therefore, have a knowledge of the methods by which business is conducted. He need not be thoroughly competent to conduct a business before he can advise regarding it, but he should be sufficiently familiar with its terms and implements to comprehend the transactions with regard to which his advice is sought. Business men like to be advised, and they will cling through thick and thin to the lawyer who will satisfactorily advise them upon problems of everyday life.

Trial by jury is coming to occupy a small part of the lawyer's time, the equity court taking a greater portion of it. Upon that side of the court the great litigations are carried on. This is no doubt owing to the more satisfactory results obtainable, generally, by allowing the court to pass upon matter of fact and law alike; also because equity courts have kept more abreast of the demands of the times. Jury trials, while they were necessary in former times to protect the freemen from the tyranny of the crown, or from subservient judges, are not so necessary now. The system is surely on the decline. With it is going advocacy in its popular sense. The great orators and the great orations of the bar are coming to be mere reminiscences. "The conditions for the development of oratory," said the doctor, "are not favorable in the class of litigation to which refer-

ence has been made, and, disguise the fact as we may, advocacy as popularly understood is surely on the decline. Go into a federal court sitting in equity, and you may usually see a quiet lawyer addressing a quiet judge, using none of the tricks of oratory, indulging neither in rhetoric nor in declamation, but confining himself to a plain and business-like statement of the facts of the cause, and of the law which governs them; and yet there may be millions of property staked upon the result." Among the 3,600 members of the Chicago bar there are but two or three who have any real gifts of advocacy in its popular sense, or who exercise it in their daily calling. "Even with the average type of jury trials, aside from criminal causes, much eloquence of speech is constantly growing less important as a necessary adjunct." Juries are generally made up of busy men, who want no more than a clear statement of facts to guide them in their decision. They will not listen to eloquent and sonorous periods, but will ask for facts, and facts alone. In the domain of criminal law oratory must continue to hold a conspicuous place, though criminal work is growing less and less in volume.

A species of advocacy, which can be learned only by experience, namely, that of the clear, logical and concise statement of the facts of one's cause, is daily growing more essential to a successful practice. It is an art more rarely witnessed than is the art of presenting the law in the case. This is an art, or a faculty as necessary to success before a judge as well as before a jury.

The young lawyer should not desert his profession for the seemingly more attractive field of politics; though a little excursion in that direction may do no harm; and it will do a great deal of good if it instructs him in the art of thinking and speaking on his feet. This is generally the result of such a course—a course which usually every young lawyer passes through.

In the two great English speaking nations, especially in this country the practice of the law is becoming too much mere "picking up of a living." It is not intended to say that this tendency is accompanied by a decline of professional integrity and skill, as it appears that the opposite is true. This condition is not favorable to the production of great lawyers, though our generation has some brilliant lights. The speaker does not despair for the future of the profession. Lawyers may, through the law school and otherwise, be induced to see and carry out the true mission of the profession. Higher standards of professional ethics may be inculcated into the new blood that is coming upon the field. We may yet see names as enduring as those of Benjamin, Coke, Hale, Story, Marshall, Kent, and Cooley. But the young practitioner must not be dazzled by these names, and overlooking those who have fallen short of their attainments, expect the same degree of success. He must remember if he has not won the highest place that they also serve who stand and wait. Do your duty wherever you are in the ranks. Remember, that the profession of the law is an honorable one. Cherish its history. Cling to its traditions. Do your full part to right the wrongs of a litigant world, and to advance the great cause of permanent justice. And when you shall have tried your last cause the "gladsome light of jurisprudence" will not have shone upon you in vain.

BOOK REVIEWS.

THE AMERICAN DIGEST (ANNUAL, 1893.)—St. Paul: West Publishing Company.

This is the seventh volume of the series and considerably larger than its predecessor. It is interesting to contemplate what the next volume will be, for it was generally supposed that the limit of size was reached last year. The period covered by this volume is from Sept. 1, 1892, to Aug. 31, 1893. It contains a digest of all the decisions of the United States supreme court, all the United States circuit and district courts, the courts of last resort of all the states and territories, the intermediate courts of New York, Pennsylvania, Ohio, Illinois, Indiana, Missouri, and Colorado, the United States court of claims, and the supreme court of the District of Columbia, during the above period. Also notes of English and Canadian cases, annotations in legal periodicals and memoranda of statutes. To this is added a table of cases digested, and a table of cases overruled, criticised, distinguished or followed. From which it will be seen that it is all it claims to be, viz: a "complete" digest. Nothing need be said as to the mechanical construction of the book. Every lawyer knows the superior manner in which all the West Publishing Company's books are gotten up. As to the editorial work the best that can be said is, that the same painstaking care which has characterized former volumes, is apparent in this one. Now and then—very seldom, however—we hear a disparaging remark about one or the other of the digests. Occasionally some error is pointed out. Nevertheless few and far between are the law offices, in which any considerable amount of business is done, that do not possess this almost indispensable lawyer's tool.

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